No. S081479

SUPREME COURT COPY

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. RONALD WAYNE MOORE Defendant and Appellant.	Monterey County Superior Court No. SS 980646

APPELLANT'S OPENING BRIEF

Appeal from the Judgment of the Superior Court of
the State of California for the County of Monterey

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DEATH PENALTY

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. RONALD WAYNE MOORE Defendant and Appellant.	No. S081479 Monterey County Superior Court No. SS 980646

APPELLANT'S OPENING BRIEF

STATEMENT OF APPEALABILITY

This is an automatic appeal from a judgment of death. (Pen. Code, §1239.) The appeal is taken from a judgment that finally disposes of all issues between the parties.

STATEMENT OF THE CASE

On May 15, 1998, an Information was filed in the Monterey County Superior Court charging appellant with first degree murder in violation of Penal Code section 187. The Information charged appellant

with two special circumstances under Penal Code section 192: murder in the commission of first degree burglary and murder in the commission of residential robbery. (Pen. Code, § 190.2, subd. (a)(17)(A),(G).) The Information also alleged that appellant had committed first degree residential robbery in violation of Penal Code section 215, subdivision (a), and alleged the use of a deadly or dangerous weapon (Pen. Code, § 12022, subd. (b)) in committing a serious felony (Pen. Code, § 1192.7, subd. (c)(11)). A third count charged residential burglary under Penal Code section 459. Two prior prison terms enhancements were alleged as to all three counts under Penal Code section 667.5, subdivision (b). (1 CT 65-69.)

Appellant's motion to suppress the statements that he made to investigating officers on March 4, 1998, was heard and denied by the trial court at a pretrial hearing. (2 CT 364.)

On June 10, 1999, appellant's jury found him guilty on all counts and found true the enhancements and special circumstances. (2 CT 441-442.) Following the penalty phase of appellant's trial, the jury returned a verdict of

death on June 22, 1999. (2 CT 459.)

On August 16, 1999, the trial court denied appellant's automatic motion for modification of the verdict, which was made without the benefit of a written motion or argument by appellant's trial counsel. (2 CT 498-500.) That same day, the trial court sentenced appellant to death. (2 CT 504.) It also imposed a total term of eleven years, four months for the burglary and robbery convictions, along with the related enhancements, which it stayed pending the death judgment. (2 CT 505-506.)

Appellant's appeal to this Court is automatic. (Pen. Code, § 1239, subd. (b).)

STATEMENT OF FACTS

A. Guilt Phase

1. The Crime and Appellant's Arrest

On the afternoon of March 4, 1998, appellant's neighbor, Dennis Sullivan, was wakened from a nap by his wife around 3:00-3:20 pm. Appellant was just outside the front door, slumped over, and said that he wanted to buy some cigarettes. (31 RT 6015-6021.) Sullivan had trouble understanding appellant because he appeared to be intoxicated and had the shakes. (31 RT 6041-6042.) At one point, appellant fell down and Sullivan helped him up.

Appellant was wearing a gray, red, and black colored serape and carried several items with him, including a fanny pack, bungie cord, butcher knife, his cane, and a round cylinder.[1/] (31 RT 6030, 6047.) The handle of the cane was broken. Appellant explained that he had broken it when he swung it at a Mexican the day before. Sullivan did not notice any substances on the cane. (31 RT 6025-6027.) Appellant left after about 15-20 minutes. (31 RT 6035.)

Later that afternoon, Rebecca Carnahan, appellant's next door neighbor, returned home after work, expecting to find her 12- year-old daughter, Nicole, at home. Nicole typically came home from school and changed her clothes. She fed her 4-H livestock, had a snack, and started her

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1. Sullivan initially told investigating officers that appellant was wearing a blue sweatshirt or shirt. (31 RT 6032.)

homework. She had been told not to answer the telephone or let anyone into the house when she was there by herself. (27 RT 5241.)

The front door was locked and no one responded when Rebecca knocked. (27 RT 5255.) Rebecca went to the back of the house and found that the door was ajar and that she could push it open. (27 RT 5256.) She saw that the kitchen and living room had been ransacked and that various items were missing. Nicole's school books were on the kitchen table. Rebecca looked in Nicole's room but did not see her and went back outside. Rebecca was inside the house for only a few seconds. (27 RT 5257-5259.)

Rebecca saw appellant running away from her house towards her back pasture, carrying a bundle tucked under his arm. She called out to him, but he did not stop. (27 RT 5261, 5263.) He went back to his property through a hole in the fence that she had not seen earlier in the day. (27 RT 5262.) Rebecca could see his reflection through the cracks in the fence and continued to ask what was happening. Appellant stated, "I didn't do it. I didn't do it." (27 RT 5263.)

Rebecca went to ask other neighbors if they had seen Nicole. She asked Richard Grimes if he had seen anything, but he had been busy working on his fence and had not seen any strangers or anything unusual in the neighborhood. (28 RT 5422-5423.) Rebecca told him that Nicole was missing. They went to Rebecca's house and out into the back yard to see if they could find Nicole. (28 RT 5424.) Grimes saw some boards were missing from the fence and there was a heavy trunk in the yard that had been dragged and opened. (28 RT 5426.) Grimes returned to his house with Rebecca and called the sheriff. (27 RT 5265; 29 RT 5427.)

According to Grimes, it took the sheriff almost 45 minutes to arrive. (28 RT 5429.) During that time, Rebecca was in the street,

hollering to find out what had happened to her daughter and trying to let people know that Nicole was missing. (27 RT 5265; 28 RT 5437.) Joseph Lindsay, another neighbor, went with Rebecca into her house and called 911. (27 RT 5267; 28 RT 5438.) By then, neighbors were gathering near the Carnahan house. Lindsay saw appellant come from his property and join the gathering, carrying a can in his hand. (28 RT 5442.) Grimes noticed that appellant had a beer in one hand and a cane in the other. (28RT 5430.) Rebecca saw that appellant was drinking Budweiser beer, the same brand that she had in her refrigerator. (37 RT 5273-5274.) Appellant was very unsteady and Grimes had to help him up after he fell. (28 RT 5434.)

Appellant told Rebecca that he had seen two Mexicans fleeing or leaving her yard and tried to chase them away. (27 RT 5269.) Appellant also told her that he had asked Nicole for a drink of water. Rebecca asked what he was doing at her house. Appellant said that he was thirsty. (27 RT 5275.)

Deputy Sheriff Larry Robinson was the first officer to arrive at the scene, about 20 minutes after Rebecca's call. (28 RT 5451.) He met Rebecca in the driveway and she took him into her house. He did not go into the bedrooms, but saw that the bedrooms and living room were ransacked. There were a few items on the floor in the kitchen. (28 RT 5453.) Rebecca told him that several items were missing from the house, including Budweiser beer. They went into the backyard and Rebecca pointed out items that had been in the house. (28 RT 5455-5458.) There was a trail through the grass that led to the hole in the fence. (28 RT 5463.) Robinson went through the hole and knocked on the door of both the trailer and the house on appellant's property. No one answered at either location. (28 RT 5460-5462.)

After Robinson met with other officers, he knocked again on the door of the house. Appellant answered and told him that the door was locked so that he would have to come to the front window. (28 RT 5468.) There were no lights on inside the house and appellant explained that the electricity had been turned off. (28 RT 5470.) Appellant said that he had seen Nicole earlier that day. She gave him a drink of water and helped him up after he fell down. (28 RT 5472.)

Appellant gave Robinson permission to look for Nicole inside the house. Robinson and another deputy crawled through the front window. It was getting dark and they used flashlights. Robinson noticed a cold, unopened can of Budweiser beer sitting on a stack of boxes. They did not find Nicole in the trailer and searched the backyard of Moore's house. (28RT 5274-5275.) Near the trailer, Robinson saw a black guitar case that stood out because it appeared to be clean, rather than weathered like the items around it. (28 RT 5476-5477.)

Deputy Sheriff Michael Shapiro spoke with appellant while Richards and Robinson searched the house. Appellant said that Nicole gave him some water around 2:00 pm. Appellant assumed the glass was still inside the house. He said that he had almost fallen down, but that Nicole prevented him from falling. He had not seen her since. (30 RT 5864.)

Officers also spoke with appellant later that evening in the patrol car, where they met because the trailer was dark and cold.[2] (28 RT 5481.) (3 CT 562.) Appellant told the officers that he had seen two Mexican prowlers around the neighborhood earlier that day.[3] He stated that other neighbors had seen prowlers at night and that Dennis Sullivan had chased two men off. Two men had tried to rob appellant as well.[4] (3 CT 563-566.) He explained that he went to the Carnahan house because he had noticed that boards were missing from the fence and he wanted to let them know about the events in the neighborhood. (3 CT 570.) Nicole gave him water and caught his arm when he got dizzy. (3 CT 571.) About a half hour later, he saw a Mexican man in his 20's in the Carnahan yard, (3 CT 572.) The man ran off when appellant called out to ask who he was and what he was doing. Appellant tried to chase the person, but could not catch him. He told Rebecca to call the sheriff. (3 CT 573-575.)

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2. Deputy Robinson turned on the tape recorder before beginning the interrogation. (28 RT 5481.) The tape was played for the jury in its entirety (28 RT 5482), but transcribed only as part of the Clerk's Transcript. (3 CT 562-591Clerk's Transcript. (3 CT 562-591.)

3. The prosecution presented neighborhood witnesses who testified that they had seen no strangers that day. (See 34 RT 6516 [Charles Holden]; 34 RT 6627 [Robert Hooper]; 34 RT 6635 [Heidi Kontos]; 34 RT 6643 [Kevin Armstead].) Barbara McCrobie, however, saw a Hispanic male teenager walking down the street. (37 RT 7244.)

4. Sullivan denied telling appellant that Mexicans tried to rob him. When appellant visited him on the afternoon of the crime, Sullivan told him that a field worker was looking for work, peeking through the window and knocking on the front door. (31 RT 6038.)

Appellant explained that he has problems with balance and muscle control so that he cannot run or lift heavy items.[5] (3 CT 581.) He also told the officers that the day before he had biked to the store to buy beer and other items, which he kept cold in an ice chest. (3 CT 569.)

While appellant was talking to the officers in the patrol car, investigator John Hanson arrived and walked through the Carnahan house with other officers. Hanson found Nicole's body in the bedroom, between the headboard of the bed and the wall. (28 RT 5496; 30 RT 5881.) Deputy Sheriff Glenn Brown examined the crime scene and found blood throughout the room. (29 RT 5610-5649.) It appeared that Nicole's skull had been fractured and there was a great deal of blood on her head and face. (29 RT 5650-5651.)

While appellant and the officers were waiting near the patrol car, they heard Rebecca Carnahan scream loudly. Appellant asked if they had

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5. In general, appellant had difficulty walking. Richard Grimes observed that the furthest he had seen appellant walk was to the mailbox, and he had never seen appellant do any kind of physical labor. Grimes stated that appellant could ride a bike or moped, but at times he walked hunched over and had to use a cane. (28 RT 5430-5432.) Joseph Lindsay testified that appellant appeared to be half-crippled when he walked. (28 RT 5445-5446.) As discussed above, both Grimes and Dennis Sullivan had helped appellant after he fell on the day of the crime. (28 RT 5434; 31 RT 6049.)

The prosecution presented witnesses who testified that appellant could walk without a cane and engaged in activities that indicated that he was strong enough to have committed this crime. (See 34 RT 6504 [Paul Husman states that appellant was able to climb into dumpster and scavenge it]; 34 RT 6622 [Robert Hooper states that appellant did not always use cane]; 34 RT 6654 [Charles Murray testifies that appellant walked in the jail without assistance]; 35 RT 6806 [Fred Dalton states that appellant walked in his cell without a cane].)

"found her." (2 CT 550.) Hanson asked appellant to come to the station for a full interview. (30 RT 5869.) Appellant requested that they meet later, but Hanson insisted that it be done immediately. (2 CT 549.)

Investigator Hanson questioned appellant in the interview room, where he was later joined by Deputy Lorenzana. Appellant repeated what had happened that day in greater detail and consistently denied committing a robbery or killing Nicole. (30 RT 5890-5899.) During the interrogation, Victor Lurz, a forensic technician, collected appellant's clothes and took several hair samples from appellant. (34 RT 6428, 6434.) Appellant was arrested at the end of the interrogation. (30 RT 5910.)

2. The Crime Scene Investigation

Chuck Bardin, a criminal investigator, arrived at the crime scene around 8:20 p.m. and observed that the path between the Carnahan home and appellant's property had the grass beaten down as if someone had made several trips back and forth. (31 RT 6051, 6055.) There was no sign of forced entry to the Carnahan house. (31 RT 6061.)

Bardin searched appellant's house pursuant to a warrant that was issued on March 5, 1998, at 3:55 a.m. The power was off in the kitchen and there was no refrigeration. He collected a cane and ski gloves that had a damp red substance on them. There appeared to be blood smears next to the shower and on the sink and counter. He found a fanny pack on the bathroom floor. (31 RT 6070-6077.) There were so many syringes throughout the house that the officers had be careful where they sat. (31 RT 6096-6098.)

After Rebecca Carnahan prepared a list of the items that were missing from her house, Bardin prepared a second warrant that was executed at 8:00 a.m. on March 7, 1998. (31 RT 6084.) Sheriff's

investigator Don Smythe searched the living room and kitchen. The house was a mess, with things piled up to the level of light switches. He described clothes, pots, and pans that were stacked like a dump or warehouse. (32 RT 6241.) Smythe found a brown and blue reversible poncho in a pile of clothes in the living room. (31 RT 6086-6087; 32 RT 6241) The officers found items that had been taken from the Carnahan residence. (32 RT 6244.) A metal cylinder in appellant's trailer appeared to have blood stains on it. (32 RT 6219.) Officers also seized several knives from inside the house. (32 RT 6249.)

Rebecca Carnahan identified a number of items that the officers found in appellant's shed, including a phone and answering machine, candy, bubble bath, beer, margarine, meat, antiques, and a jewelry box. (28 RT 5402, 5405-5409; see also 31 RT 6217 [testimony of Santiago Limas describing search of appellant's shed].)

Max Houck, a physical scientist with the Federal Bureau of Investigation, examined items gathered during the sheriff's investigation. (32 RT 6252, 6255.) He found hairs on paper towels, a T-shirt, and the poncho that were taken from appellant's house. The hairs were consistent with those from Nicole Carnahan. One of the hairs was twisted, indicating a possible struggle. (32 RT 6276-6281.) Houck also tested the items for fibers and found some that were consistent with Nicole's sweatshirt. Although fibers are mass-produced, he stated that it is rare to find two fibers at random that are exactly the same. (32 RT 6289-6291.)

Brian Burritt, a criminalist, tested various items for DNA. (36 RT 7014.) He used both the Polymerase Chain Reaction (PCR) and the restriction fragment length polymorphism (RFLP) tests. (36 RT 7057.) The RFLP tests were consistent with Nicole being the source of the blood

on the poncho. The frequency of the DNA was one in 96 million, so that only two or three people in the United States had its particular profile. (36 RT 7064.) He obtained identical results after testing swabs that were taken from the cane found in appellant's house. (36 RT 7071-7072.) PCR tests provided similar results for blood found on the carpet, gloves and pocket knives. (36 RT 7072, 7076, 7078). He further tested these items for sex-typing and found the items that were consistent with Nicole came from a female, making the frequency one in 96 million females. (36 RT 7086.)

Fred Walker, a forensic pathologist, conducted the autopsy of Nicole Carnahan. (36 RT 7096.) He testified that Nicole had suffered several scalp and head wounds that were consistent with having been inflicted with the metal cylinder that had been found by the officers. (36 RT 7103, 37 RT 7206.) She also had defensive wounds on her hands and wrist that could have come from the cane. (37 RT 7212.) There were numerous lacerations and slicing wounds, including a piece of knife that protruded from the neck area. (37 RT 7216.) He concluded that the cause of death was multiple head and neck wounds, which killed Nicole within minutes. (37 RT 7226.)

3. Appellant's Drug Use

Shortly after appellant was arrested, officers obtained blood and urine samples from him. (30 RT 5910.) Gary Davis, a forensic toxicologist, analyzed these samples for drugs and found that various metabolites indicated that appellant had used cocaine, heroin, methadone, valium, and marijuana. He did not know when the drugs might have been taken or the effect that they might have had upon appellant. (37 RT 7251-7253.)

David True, an HIV educator, had known appellant for around three years. The day before the crime, he saw appellant talking to a police

officer. He stopped to help and drove appellant back to his home. (38 RT 7256-7257.) Appellant was very agitated and appeared to be under the influence of cocaine and heroin. (37 RT 7258, 7260, 7263.) Although he felt that appellant was unable to take care of himself, he left him at the house after about 20 minutes. True believed that appellant could possibly hurt someone and needed to settle down. (37 RT 7262-7263.)

Reese Jones, a psychiatrist, testified in rebuttal that he reviewed appellant's medical records and did not find any signs of severe or moderately-severe heroin, opiate, valium, or cocaine withdrawal. (RT 7648.) He stated that these drugs, with the exception of cocaine, would reduce aggression and violence. (RT 7657-7658.)

B. Penalty Phase Aggravation

1. The 1983 Burglary

In 1983, a silent alarm went off at Dennis Winfrey's flower nursery. Winfrey woke up his brother and nephew so that they could block the driveway, then grabbed a gun and walked toward the boiler shed to see if he could spot a car. Winfrey saw someone leaving and told him to stop. Two shots were fired as Winfrey ducked and returned the fire. He saw three people running, one of whom fell or tripped. He heard someone groaning. (44 RT 8621-8631.)

Kenneth Neville, Winfrey's nephew, found appellant lying on the ground, moaning that he had been shot. (44 RT 8653.) An ambulance and the sheriff were called. The deputy sheriff later found a portion of a rifle near where the ambulance team had treated appellant. (44 RT 8667.) Appellant was taken to the intensive care unit of the county medical center. (44 RT 8677.) John Schloss, a deputy assigned to the unit, heard appellant

say that he was not trying to shoot anyone, but fired his weapon in order to get away. (44 RT 8682-8687.)

Appellant was convicted of burglary. (44 RT 8705; People's Exhibit 12 [abstract of judgment].) Appellant acknowledged having committed a burglary in statements he made to the officer when he was interrogated about the present case. (44 RT 8700.)

2. The 1997 Incident

On December 2, 1997, Raul Garcia drove his wife, Joyce, to the methadone clinic in Salinas. Appellant approached the car, screaming that Joyce owed him money. Raul got out of the car, and appellant continued to scream at him. (45 RT 8806-8808, 8828.) Appellant had a cane, which he broke down to make a weapon. Appellant also pulled out a knife. Joyce thought appellant was going to stab Raul and she ran up and kicked the knife away.[6/] (45 RT 8810-8812, 8830.)

Alonzo Gonzales, the director of the methadone clinic, came out and saw appellant screaming and yelling obscenities at the Garcias. (45 RT 8848.) Appellant had a cylindrical object, that Gonzales thought was either a flashlight or collapsible cane. (45 RT 8849.) He did not see a knife, nor did he find one around the bushes near where appellant had been standing. (45 RT 8852, 8857.)

3. The 1998 Incident

Robert Hooper, a neighbor of appellant's, heard some yelling on March 2, 1998. (45 RT 8860.) He went to the fence and saw appellant arguing with two women. One of the women went to the road, behind some

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6. Joyce told investigators that appellant had a kit instead of a knife, but testified that she was sure that the object was a knife. (45 RT 8842.)

trees where Hooper could not see. Appellant pulled her back to the house by the arm. The woman cussed at appellant. At some point, appellant dragged her across the grass by the leg. (45 RT 8863-8864.) He did not know the woman and did not try to intervene or call the police. (45 RT 8866.)

4. Evidence Pertaining to the Circumstances of the Crime or Victim Impact

Greg Avilez, a senior criminalist with the Department of Justice, examined the blood spatters and blood spots at the scene of the crime. (45 RT 8870.) He stated that a low velocity spatter is when someone bleeds onto a surface; medium spatters occur when someone is struck with an object; high velocity spatters indicate a gunshot wound. (45 RT 8871.) He found low velocity spatters on a jacket hanging from Nicole's bunkbed. (45 RT 8872.) There were several medium velocity spatters throughout the room. (45 RT 8879.) He believed that Nicole had been struck near her closet, and that additional blows were struck in other locations in her bedroom and living room. (RT 45 8880-8881.)

Rebecca Carnahan testified about Nicole's life and the impact of the crime upon her. Nicole liked arts, crafts, and 4-H projects. She worked hard in school. (45 RT 882-8883.) Rebecca spent a lot of time with Nicole, and particularly remembered Nicole's eighth birthday party because it lasted the entire weekend. (45 RT 8887-8888.) She thinks about Nicole's death every day, partly because Nicole was alone when the crime happened. She no longer celebrates holidays. (45 RT 8888-8890.)

Michael Carnahan, Nicole's father, spent as much time with her as he could. Nicole was four when he divorced Rebecca. Although he had moved to Southern California to take care of his parents, he saw Nicole

frequently and they went to various events together. He felt very close to her. (45 RT 8894-8900.)

C. Penalty Phase Mitigation

1. Appellant's Family

Louise Moore, appellant's sister, stated that appellant had a good childhood, but began using drugs when he was 19 or 20 years old. His parents tried to help him and she took him to a methadone clinic every day. (46 RT 9006, 9008.)

Appellant was married in 1975 and had four daughters. His wife also had a drug problem and appellant took care of the girls. (46 RT 9009-9010.) After appellant and his wife divorced, she took custody of the children and appellant moved into a trailer behind his mother. He continued to use marijuana and heroin, so their mother took him to the methadone program. Their mother tried to help appellant as much as she could. (46 RT 9011-9013.)

Appellant began to have trouble walking around 1995 or 1996. He stumbled, lost his balance, and fell a lot. (46 RT 9013-9014.) More recently, Louise noticed changes in him. Appellant was nervous and very distant. She could not talk to him. He was still using drugs. Louise once saw him walking and stumbling and offered him a ride, but he refused. (46 RT 9015.)

The last time Louise saw appellant before his arrest was on Christmas Eve, when their mother asked her to bring him food because he was starving. Their mother had moved away, but appellant had permission to use the house for showers and to take care of the place. No one answered the door when Louise knocked, but appellant's girlfriend, Ladell, shouted

from inside. Ladell had threatened her in the past, so Louise called the sheriff who helped her give the food to appellant. (46 RT 9016-9017.)

Veronica Rodriguez, one of appellant's daughters, remembered appellant carrying her in a baby backpack. (46 RT 9020.) She was six when her parents divorced. She did not have contact with appellant between the ages of 14 to 19 years old, when appellant attended her high school graduation. (46 RT 9022.) She took him food around Christmas in 1997. Appellant was thin and did not look well. She was worried about him, but did not see him until after he was arrested. (46 RT 9023-9024.)

Mary Moore, another of appellant's daughters, remembered being with appellant when she was young. She did not see him from age 9 to 18 because appellant was using drugs and her mother thought it best that she not see him. She saw him again at her sister's graduation and since that time on holidays and weekends. She loved him greatly. (46 RT 9025-9028.)

2. Appellant's Mental Health History and Neurological Problems

Arthur Kowell, a neurologist, conducted an examination of appellant after he was arrested and testified about appellant's substantial history of drug use. (48 RT 9405.) At 17, appellant began using speed, barbiturates, marijuana, and alcohol. At 18, he increasingly used heroin. Appellant left high school in the 12th grade because of his use and abuse of psychotropic drugs. Over the years, appellant used methadone. Between 1997 and March, 1998, appellant injected cocaine intravenously daily. From 1995 to 1997, appellant drank up to four quarts of beer a day. (48 RT 9407.)

In 1997, appellant was a passenger in a car accident and struck his head on the windshield. Appellant lost consciousness for two or three minutes. Appellant also suffered a head injury in 1983, when he fell after being shot. (48 RT 9408.)

In 1995, appellant began to suffer from impaired balance. He had difficulty running and weakness in both his legs and hands. The complaints were less severe in the year before he was examined by Dr. Kowell, but he still had problems walking. Kowell found that appellant suffered from a neurologic problem affecting his extremities, the nature of which had not been definitively determined. (48 RT 9408-9409.) The neurological examination showed that appellant's gait and ability to walk were abnormal. (48 RT 9412.)

Dr. Kowell ordered a SPECT scan of appellant's brain. (48 RT 9413.) Based on his review of the scan, Kowell testified that appellant suffers from a dysfunction involving the frontal and temporal lobes. These abnormalities are not always predictive of what a person will do, but can indicate problems in emotional function, impulse control, and memory. Abnormalities in the frontal lobes are important in determining whether a person has the desire or will to change. (48 RT 9421-9422.) Dr. Kowell testified that appellant's brain abnormalities might affect his ability to appreciate the criminality of his conduct or to conform to the law. (48 RT 9424) Dr. Kowell saw no evidence of a thought disorder and did not believe that appellant's abnormalities resulted in a pre-programmed pathway that caused him to commit the crime. Rather, appellant had a neurologic condition that could affect his ability to think about things or control his behavior. (48 RT 9447, 9471.)

Dale Watson, a neurospychologist, conducted an evaluation of appellant to assess how his brain function affected his behavior. (49 RT 9610.) In addition to providing Dr. Watson with his history of drug use, appellant described being sexually molested by an adult male when he was 16 years old. Watson testified that this was significant because sexual abuse and trauma often impacts a person's life experience and can affect sexual adjustment, self-esteem, and subsequent drug use. (49 RT 9612-9613.) Dr. Watson conducted several tests that revealed some neuropsychological deficits. (49 RT 9614-9615.) In particular, appellant did very poorly on tests for memory and attention function, indicating an attentional deficit. (49 RT 9617.) Moreover, on the Wisconsin Card Sort test, appellant performed at less than the first percentile for people of his age and education. Appellant got stuck in mental ruts and had a difficult time shifting. People with this problem keep on doing the things that they should not be doing and cannot figure out how to do something different. It suggests frontal impairment. (49 RT 9622-9625.)

Dr. Watson believed that appellant suffered from a mild brain dysfunction. (49 RT 9625-9626.) Dr. Watson did not believe that appellant was malingering. (49 RT 9646-9647.) Although he did not suggest that the deficits caused appellant to commit the crime, they may have influenced appellant's behavior because they affect judgment, organization, and the ability to make decisions. (49 RT 9684-9685.)

In rebuttal, Michael Mega testified that he was an assistant professor at the University of California, Los Angeles, and researched neural imaging. (49 RT 9688.) He did not find any evidence that appellant had significant brain damage. (49 RT 9692.) He saw some abnormality in the brain SPECT, but testified that it is not possible to determine from a scan

what would cause one person to murder another. He believed that a person with this condition could differentiate right from wrong. (49 RT 9698-9699.)

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ARGUMENT

I

THE TRIAL COURT ERRONEOUSLY DENIED APPELLANT'S MOTION TO SUPPRESS HIS STATEMENTS TO THE SHERIFF INVESTIGATORS

Appellant filed a pretrial motion to suppress his statements to the sheriff investigators on the grounds that he was unlawfully questioned in violation of his Fifth Amendment rights under *Miranda v. Arizona* (1966) 384 U.S. 436. (1 2d. Supp. CT 67.) The trial court denied the motion, finding that appellant voluntarily spoke with the investigators and was not subject to a custodial interrogation. (11 RT 2022.)

A. The Interrogation

Larry Robinson was the first officer to respond to Rebecca Carnahan's call. During his initial investigation, he noticed a hole in the fence separating the Carnahan house from appellant's property, with a trail in the grass leading through the hole. (10 RT 1819 .) Robinson followed the path through the fence to appellant's residence and spoke with appellant. (10 RT 1804, 1820.) Appellant allowed Robinson and another officer to search his house and property to look for Nicole. (10 RT 1807, 1821.) During the search, Robinson noticed a cold can of beer, which was the same brand that was missing from the Carnahan house. Robinson thought this was unusual because there was no electricity in appellant's house. (1 2d Supp. CT 219.) He also saw a black guitar case in the yard and noticed that it was not weathered. (10 RT 1822.)

After this initial search, Robinson again spoke to appellant. Robinson knew appellant to be a drug user. (10 RT 1823.) He also knew that a neighbor, Dennis Sullivan, had reported seeing appellant under the

influence "like he was doing speed balls" and carrying a broken cane and knife. (1 2d Supp. CT 80-81 [police report indicating that Robinson was familiar with Sullivan's statements].) However, Robinson testified that he did not consider appellant to be a suspect at this time. (10 RT 1810.)

Robinson asked appellant to come outside to the patrol car so that he could speak to the investigators. It was dark and cold and there was no lighting or electricity in appellant's house. (10 RT 1808-1810.) Appellant said that he would invite the officers inside if he had power. (2 CT 535.)

After Robinson initially questioned appellant, he asked him to remain in the patrol car. (10 RT 1813.) The door of the police car was shut and locked. (10 RT 1842, 1857.) Deputy Shapiro stood by to maintain security. (10 RT 1841, 1843.)

Robinson returned after about 10 or 15 minutes and appellant asked for a cigarette. The officers "allowed" appellant to step outside the car to smoke. (10 RT 1868.) When he finished, appellant returned to the patrol car and sat on the back seat with his legs outside of the car. Investigator Hanson asked appellant to go to the sheriff's office to make a detailed statement. Appellant asked if it could be done later, but Hanson insisted that it be done at that time. (10 RT 1847, 1857; 2 CT 549.)

Around that time, Rebecca Carnahan screamed loudly. Appellant asked if they had "found her." (2 CT 550; 1 2d Supp. CT 86.) Hanson later

told appellant that this statement tipped him off that appellant was involved in the murder.[7] (3 CT 711-712.)

At the sheriff's station, the officers took appellant to a locked interview room. (10 RT 1919.) Hanson told appellant that he was not under arrest and was free to go. Appellant was not advised of his *Miranda* rights at that time. (3 CT 596.) Soon after the interrogation began, Officer Lorenzana joined Hanson since he had more information about the crime and was familiar with the interviews of Rebecca Carnahan and Dennis Sullivan. (3 CT 607; 10 RT 1917.)

In response to the officer's questions, appellant repeated his account of what happened that day. Appellant stated that he had visited Dennis Sullivan in order to buy beer and a pack of cigarettes from him. (3 CT 600, 604.) He learned that Sullivan had seen two Hispanic men in the neighborhood and that someone had recently tried to burglarize Sullivan's house. (3 CT 601, 610.) Another neighbor had been burglarized a few days before and appellant's mother's house had been burglarized several times that summer. (3 CT 609, 627.) Because of these problems, appellant carried a cane, a knife, and a piece of pipe for protection. (3 CT 658.)

After appellant had returned to his home, he noticed three boards had been knocked off the fence. (3 CT 602.) He went through the hole and knocked on the back door at the Carnahan house at around 2:30 p.m. in

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7. This statement did not indicate guilt. During the ride to the sheriff's station, appellant asked Deputy Shapiro why Rebecca had screamed. (3 CT 578.) At the sheriff's station, appellant asked if the officers had found Nicole. Hanson told him that they had not and they were concerned about that. (3 CT 6403 CT 640.) When Hanson eventually told appellant that they had found Nicole, appellant asked if she was all right. (3 CT 656.)

order to warn Rebecca about recent events. Nicole answered and appellant asked for a drink of water. He became dizzy and almost fell as a result of a frontal lob syndrome that sometimes causes him to lose his balance. Nicole caught him, however, and he was able to return home. (3 CT 603, 605-606, 630.)

According to appellant, about 90 minutes later, he saw a young Hispanic man in the Carnahan's backyard, wearing dark clothing. (3 CT 611.) Appellant called out, "What are you doing?" The man ran to the back of the property and appellant lost track of him. (3 CT 612.) Appellant tried to follow him but could not run and the man got away. (3 CT 613.) Rebecca saw him in her yard and asked what he was doing. Appellant explained that he was chasing a man who was back there and that she should call the sheriff. (3 CT 615.)

Appellant told the officers that learned that Nicole was missing after he heard Rebecca screaming for Nicole in her front yard, where neighbors were gathering. (3 CT 620.) Soon after, he fell down and hit his elbow. Appellant returned home to lay down. (3 CT 623.)

Appellant stated that he was on friendly terms with Rebecca, particularly since his mother had moved out of the house. They visited each other on occasion and talked about their respective relationships. (3 CT 640-642.)

Hanson's questioning grew increasingly confrontational and he repeatedly asked appellant if he burglarized the Carnahan house. (3 CT 638-639.) Hanson suggested that appellant may have needed some money to buy heroin. (3 CT 639.) He repeatedly asked appellant if he knew what happened to Nicole and accused him of not being honest. (3 CT 649, 655.) He said, "I'm just thinking maybe you're not being totally honest with me,

and you were in that house when it was being burglarized." (3 CT 650.) Hanson focused on appellant's question in the patrol car when he asked if the officers had found Nicole. (3 CT 656-657.)

Appellant expressed concern that the officers were trying to trick him. (3 CT 661.) After Hanson still professed that appellant that was not under arrest, appellant asked for a ride home. Hanson ignored this request and told appellant that they were "a little suspicious." (3 CT 662.)

A short time later, appellant again stated that the officers were trying to trick him and asked for a ride home:

> Man I – Can I get a ride home please? Can I please get a ride home? You are going to charge me or what, you know? I got my rights. I'm not on pro– I'm not on probation.

(3 CT 666.) Hanson again did not respond to this request, other than to tell appellant that he wanted to "make sure that you're being up front and honest with us." (3 CT 666.)

Appellant again asked for a ride and wondered aloud whether he would have to walk home. Hanson told appellant to sit down. (3 CT 666.)

Hanson asked appellant if he would voluntarily give him his clothes and put on a jumpsuit. Appellant attempted to bargain for his release: "If you take me home, I will, yeah." (3 CT 668.) Appellant said he did not want to change until he could get to his house, but the officers told him it was better to do it at the station and appellant reluctantly agreed. (3 CT 669.)

Deputy Lorenzana again asked appellant if he were telling the truth. (3 CT 670.) Appellant stated that he could tell that Lorenzana thought he committed the crime. (3 CT 671.) Hanson told appellant that they would take him home as soon as they got his clothes. (3 CT 673.)

Hanson continued to question appellant about his involvement: "I'm not saying that you intentionally tried to harm her." (3 CT 674.) Appellant continued to insist that the officers were trying to trick him. (3 CT 675-676.)

After appellant gave the officers his clothes and they took pictures of him, Hanson continued to ask appellant if he was responsible for Nicole's death. Hanson told appellant to sit down and they would find a patrol car to take him home. (3 CT 689.) After further questioning, Hanson again stated that they needed to get a patrolman back to the station so they could give him a ride home. Lorenzana was sent to find an officer. Appellant suggested that Hanson drive him back. (3 CT 695.) Hanson told appellant to wait until Lorenzana came back and continued to question him about the crime. (3 CT 696.)

After further questioning, Hanson asked appellant if they could swab his hands. Appellant again told him that he wanted to go home. Hanson informed appellant that "things are developing out there . . . that may link you to the crime scene." (3 CT 698.) Appellant said he would not stay voluntarily, but Hanson told him, "We're going to ask you to stay as a suspect." (3 CT 699.) At the suppression hearing, Hanson testified that Lorenzana informed him of evidence that had just been obtained at the crime scene and that appellant was not free to go. (10 RT 1892, 1896, 1900, 1901.)

Appellant asked if he could go home after the officers questioned him further. At that point, Hanson informed appellant of his rights under *Miranda* and appellant agreed to talk to the officers. (3 CT 700-701.)

Hanson told appellant that they were going to use physical evidence to link him to the crime (3 CT 710), and then pointedly questioned

appellant about his involvement in the crime. After appellant asked for a lawyer, Hanson stopped questioning appellant. (3 CT 717-718.) The interrogation lasted one hour and 45 minutes. (11 RT 2007.)

B. The Interrogation Violated Appellant's Fifth Amendment Rights

The United States Constitution provides that no person "shall be compelled in any criminal case to be a witness against himself." (U.S. Const., 5th Amend.) This provision guarantees a person's right to remain silent "unless he chooses to speak in the unfettered exercise of his own will." (*Malloy v. Hogan* (1964) 378 U.S. 1, 8, 84.) Thus, the Fifth Amendment bars the introduction in criminal prosecutions of involuntary confessions and other statements made in response to custodial interrogation unless a person knowingly waived the right to remain silent. (*Miranda v. Arizona*, *supra*, 384 U.S. at pp. 460-464.)

Under the Fifth Amendment, an individual may speak to officers voluntarily without requiring additional protection, but in a custodial interrogation officers must advise a person of the applicable rights and stop the interrogation if the individual does not want to speak to them. (*Miranda v. Arizona*, *supra*, 384 U.S. at p. 474.) In *Miranda*, the High Court recognized that any statement obtained by an officer from a suspect during custodial interrogation is potentially involuntary because such questioning may be coercive. It therefore held that statements given by a suspect in custody cannot introduced as evidence unless he or she has been advised of his rights and given appropriate warnings before he or she is interviewed. (*Id.* at pp. 467-468.) These rights must be honored: "if the individual is alone and indicates in any manner that he does not wish to be interrogated, the police may not question him." (*Id* . at p. 445; see also *id.* at p. 473-474

[if a person "indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease"].) Although these rules have been described as "prophylactic," they are constitutionally required. (*United States v. Dickerson* (2000) 530 U.S. 428, 437-438.)

The trial court erroneously found that appellant had consented to questioning by the officers so that he was subject to custodial interrogation until he was told that he was not free to go home. (11 RT 2022.) Because the facts underlying the trial court's decision were not contested, this Court should review the issue independently. (*People v. Johnson* (1993) 6 Cal.4th 1, 25 [independent review when facts are not contradicted].)

A custodial interrogation occurs when "a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." (*People v. Mickey* (1991) 54 Cal.3d 612, 648.) The test is an objective one: whether there was a formal arrest or restraint on freedom of movement' of the degree associated with a formal arrest. (*People v. Leonard* (2007) 40 Cal.4th 1370, 1400; *Berkemer v. McCarty* (1984) 468 U.S. 420, 442.) When there has been no formal arrest, a reviewing court must determine how a reasonable person would have understood his or her situation. (*People v. Boyer* (1989) 48 Cal.3d 247, 272.) This Court has recognized that no one factor is dispositive in making this determination, but the most important considerations include the site of interrogation, whether the investigation has focused on the defendant, if there is objective

indicia that a defendant is not free to go, and the length and form of the questioning.[8] (*Ibid.*)

In *Boyer*, the defendant was taken to the police station without being handcuffed in order to give a statement and was told that he would be taken home in a matter of hours. Yet, the officers actions and questioning demonstrated that they would not take "no" for an answer. (*People v. Boyer. supra*, 48 Cal.3d at p. 268) In an interrogation spanning nearly two hours, the officers led the defendant to believe that suspicion had focused on him and that they considered him guilty. (*Id.* at p. 272.) Accordingly, this Court found that the interrogation occurred during a detention that was tantamount to arrest. (*Ibid.)*

The circumstances identified in *Boyer* make it clear that appellant was in custody throughout his interrogation at the sheriff's station. The officers took appellant to the station at their own insistence, even after appellant had asked that they question him at another time. Appellant was alone, far from home and dependent upon the officers for a ride home -- factors that *Miranda* noted were potentially coercive. (*Miranda v. Arizona*, *supra*, 384 U.S. at pp. 449-455 [describing coercive effect of interrogation techniques when a subject is alone, insecure about surroundings, and deprived of outside support]. The questioning identified appellant as a suspect rather than a mere witness – the officers repeatedly expressed their disbelief in appellant's story and told him that they thought he was involved in the crime. (3 CT 649, 650, 655, 662, 666.) Moreover, the length and the

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8. In reviewing whether an investigation has focused on a defendant, it is not the officer's subjective intent that is at issue, but what is conveyed to an individual being questioned. (*People v. Stansbury* (1995) 9 Cal.4th 824, 830; citing *Stansbury v. California* (1994) 511 U.S. 318, 325.)

manner of the interrogation established that appellant could not leave. When appellant first asked for a ride home, the officers stated that they were suspicious and continued to question him. When he stood up and again asked for a ride home, the officers told him to sit down and continued to question him rather than immediately stopping the interrogation. (3 CT 662. 666; see *Miranda v. Arizona*, *supra*, 384 U.S. at p. 474 [questioning must cease if a person states that they do not want to talk to police officers].) In these circumstances, a reasonable person would have understood that he could leave only when officers allowed him to do so. (See *United States v. Wauneka* (9th Cir. 1985) 770 F.2d 1434, 1438-1439 [defendant in custody after being transported to station by officers, without means to get home, and subject to increasingly accusatory questioning].)

This case is similar to *Tankleff v. Senkowski* (2d Cir. 1998) 135 F.3d 235, where the defendant's mother had been killed and his father was unconscious and mortally wounded in their family home. The defendant was interviewed in a police car by detectives. After he agreed to speak to the officers at the station, he was taken to a small, windowless room where officers questioned him for the next two hours without *Miranda* warnings. During the course of the interrogation, officers focused on inconsistencies in the defendant's story and openly expressed their disbelief in his version of the events. The defendant continued to assert his innocence even after officers used a ruse to try to trick the defendant into believing that his father had identified him. The questioning continued until the defendant made an incriminating statement and officers gave the *Miranda* warnings. (*Id.* at pp. 240-241.) Although state courts had found that the defendant voluntarily spoke with the officers, the federal court of appeal found otherwise:

> If not before, then certainly by this point in the interrogation [that the officers told him that his father had identified him] no reasonable person in Tankleff's position would have felt free to leave. Tankleff should, therefore, have been advised of his rights as required by *Miranda* much earlier than he was, and all of the inculpatory statements he made before receiving the warnings should have been suppressed.

(*Id.* at p. 244.)

Here, even assuming that appellant's interrogation began as a voluntary encounter, a reasonable person would have understood he was in custody by the time that the officers treated him as a suspect, ignored his request for a ride home, told him to sit down, and continued to question him. As in *Tankleff*, the court erred in not suppressing appellant's entire statement. (*Ibid.*)

Moreover, the technique used by the officers during their interrogation is similar to that described by Judge Trott in summarizing common police practices: "Don't advise, interrogate the suspect, violate the Constitution, use subtle and deceptive pressure, take advantage of the inherently coercive setting, and then, after the damage has been done, after the beachhead has been gained, gently advise the suspect of her rights." (*United States v. Orso* (9th Cir. 2001) 275 F.3d 1190, 1197 (dis. opn. of Trott, J., respecting denial of *sua sponte* call for full court en banc rehearing).)

A similar tactic was denounced by the High Court in *Missouri v. Seibert* (2004) 542 U.S. 600. In *Seibert*, officers questioned a defendant without giving *Miranda* warnings until they obtained a confession. The officers took a short break and then gave the required advisement. (*Id.* at p. 604-605.) The Court emphasized that "the unwarned interrogation was conducted in the station house, and the questioning was systematic,

exhaustive, and managed with psychological skill. When the police were finished there was little, if anything, of incriminating potential left unsaid." (*Id.* at p. 616.) This was improper. The Court explained that *Miranda* warnings must offer a person a real choice. If officers "question first," this choice is impermissibly compromised:

> [W]hen *Miranda* warnings are inserted in the midst of coordinated and continuing interrogation, they are likely to mislead and "deprive a defendant of knowledge essential to his ability to understand the nature of his rights and the consequences of abandoning them." By the same token, it would ordinarily be unrealistic to treat two spates of integrated and proximately conducted questioning as independent interrogations subject to independent evaluation simply because *Miranda* warnings formally punctuate them in the middle.

(*Id.* at pp. 613-614, quoting *Moran v. Burbine*, *supra*, 475 U.S. at p. 424.) Accordingly, the Court held that the suspect's statements were inadmissible even though she agreed to speak to the police after the warnings were given and repeated her earlier confession. (*Id.* at p. 617.)

Here, appellant agreed to speak to the officers after the *Miranda* warnings in an apparent effort to secure transportation home. At that point, it was made clear that he would not be taken home and appellant formally invoked his right to an attorney. (3 CT 717.) However, appellant tried to end the interrogation as soon as the officers began to question him as a suspect. (3 CT 666.) As in *Seibert*, the entire interrogation was part of a single coordinated effort that was focused on appellant. Even before appellant was taken to the station, he was pressured to talk to the officers immediately rather than be interviewed at a later time. (10 RT 1847, 1857; 2 CT 549.) After he was taken to the station it was apparent that he could not leave unless he cooperated with the officers. Thus, the entire

interrogation was coercive and violated appellant's Fifth Amendment rights. The statements should have been suppressed. (*Oregon v. Elstad* (1985) 470 U.S. 298, 307 [failure to give a *Miranda* warning creates an irrebuttable presumption of coercion for the purposes of admissibility in the prosecution's case- in-chief].)

C. The Judgment Must be Reversed

The prosecutor introduced appellant's statements to show his consciousness of guilt.[9] (See 30 RT 5884-5909 [testimony of John Hanson].) Most importantly, the statements strengthened the prosecutor's case in several significant ways. While he was in the patrol car, appellant gave a rambling account that sometimes confused times and days or shifted topics out of the blue. (See, e.g., 2 CT 539-542 [confusion about days when appellant went to the food store]; 2 CT 553 [conversation shifts from Dennis Sullivan to appellant's neurological problems and false teeth]; 2 CT 556 [shifting from discussing Nicole's father to appellant's health problems and life expectancy – "the doctor told me . . . we're all going to die"].) In contrast, appellant provided a detailed account during the interrogation at the station, aspects of which were specifically contradicted by prosecution witnesses. (See e.g., 30 RT 5906-5907 [appellant told Hanson about buying beer from his next door neighbor]; 30 RT 5909 [his friendly conversations with Rebecca Carnahan]; 30 RT 5906 [appellant contended that he was too weak to have committed the crime].) Moreover, the jurors learned from the

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9. For constitutional purposes, it does not matter if the statements were exclupatory admissions or confessions. (See *People v. Williams* (1997) 16 Cal.4th 635, 659 [involuntary admission may not be introduced]; *Bram v. United States* (1897) 168 U.S. 532, 539 [statement used to show consciousness of guilt cannot be distinguished from a confession].)

testimony about the interrogation that appellant did not want the officers to enter his house (30 RT 5903), further leading them to conclude that appellant knew he had something to hide.

The statements undercut appellant's attempts to present a defense related to his intoxication and mental state. The jury heard evidence that appellant had been particularly agitated the day before the crime, such that David True believed he was a danger to himself or others. (37 RT 7262-7263.) On the afternoon of the crime, Dennis Sullivan believed that appellant was very intoxicated and shaking to the point where appellant had difficulty communicating. (31 RT 6041-6042.) Appellant had a number of drugs in his system when he was eventually tested. (37 RT 7251-7253.) Appellant's confused and rambling statement in the patrol car might have led the jury to believe that appellant was impaired through alcohol or drug use. However, the prosecutor used appellant's statements at the sheriff's station to argue that drinking had not impaired his ability to form an intent:

> And he's telling them out of the blue unrelated to anything going on, you know, "I'm too weak. I can't even run. I can barely walk. Becky and I have been getting along great, you know. We just had a conversation not too long ago and we were talking about boyfriends and girlfriends. We're just pals, and when I went over there, that was out of concern for the Carnahans."
>
> These are the types of things that tell you he was not impaired to the extent that he couldn't form these mental states. Everything he did and everything he said tells you the opposite.

(40 RT 7837.)

The jury was invited to use and undoubtedly did use appellant's statements to reject defense evidence that appellant was intoxicated and had

taken numerous drugs before the crime was committed. This affected the jury's verdict on the nature of the homicide and the allegations of robbery and burglary, requiring that the judgment be reversed. (*Chapman v. California* (1967) 386 U.S. 18, 24.)

Even assuming that this evidence was harmless in the guilt phase, it clearly was prejudicial as to the penalty phase. The penalty phase of a capital trial is "in many respects a continuation of the trial on guilt or innocence of capital murder." (*Monge v. California* (1998) 524 U.S. 721, 732.) Appellant's jurors were instructed to consider the evidence admitted in the guilt phase. (3 CT 789, 804; CALJIC Nos. 8.84.1, 8.85.) Appellant's statements during the interrogation were undoubtedly an important factor in the jury's deliberations. His penalty defense focused largely upon his mental condition and he presented mental health experts to show that he had brain abnormalities and deficits, including impairments that affected his judgment and his ability to change his course of conduct. (49 RT 9622-9625; 9684-9685.) Yet, the prosecutor used appellant's statements to argue otherwise in the penalty phase: "This is someone who's thinking very clearly and very self-servedly." (40 RT 7837; see also 50 RT 9914-9822 [penalty phase argument using "lies" told by appellant to dismiss evidence of mental impairment].) Moreover, after finding appellant guilty of the death of a young child, the jury would have found appellant's repeated statements denying guilt to be particularly harsh. Accordingly, use of the statements placed the reliability of the penalty phase in doubt. (See *Woodson v. North Carolina* (1976) 428 U.S. 280, 305 [Eighth Amendment guarantees of heightened reliability in capital case].)

This Court should accordingly reverse the penalty judgement against appellant even if it decides that the error was harmless in the guilt phase.

(*People v. Ashmus* (1991) 54 Cal.3d 932, 965 [reversal required if there is a reasonable possibility that the error affected the penalty verdict]; *Chapman v. California* , *supra*, 386 U.S. at p. 24 [error not harmless beyond a reasonable doubt].)

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II

THE TRIAL COURT ERRONEOUSLY ALLOWED A CRIMINALIST TO SPECULATE ABOUT A BLOOD STAIN FOUND IN THE VICTIM'S LIVING ROOM

At trial, appellant objected that the prosecution's criminalist had no basis to testify about a blood stain found on the victim's carpet since it could not be determined if the stain had came directly from the victim or had been transferred from an object. (35 RT 6865, 6881, 6884.) The trial court allowed the expert to testify that if the stain was left by contact with a human being, the person had to have been lying down on the carpet. (35 RT 6890.) This testimony was more prejudicial than probative and violated appellant's constitutional rights to due process and a reliable jury verdict based upon accurate and reliable evidence. (Evid. Code, § 352; U.S. Const., 6th, 8th, &14th Amends.; Cal. Const., art.1, §§ 7, 15.)

A. Factual Background

During the course of the crime scene investigation, sheriff's deputies found a stain in the victim's living room. (30 RT 5820; People's Exhibit 36.) Greg Avilez, a senior criminalist with the California Department of Justice, examined this stain, which tested positive for blood.[10/] (35 RT 6861.) The prosecutor asked whether Aviliez could determine if a person leaving the stain would have been standing or lying down. (35 RT 6864.) Appellant objected that there was no foundation for an opinion since the question called for Avilez to speculate that the stain had been left by a person rather than be transferred from an object. (35 RT 6865.)

The trial court allowed voir dire outside the presence of the jury. Aviliez testified that the stain was in a very localized area, approximately

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10. The blood was later matched to the victim. (See 36 RT 7051.)

one inch by three-quarters of an inch. There were no other blood stains in the area. (35 RT 6874, 6875.) Appellant objected that it was not possible to determine if the stain came directly from the victim or if it was left on the carpet after being transferred from an object. (35 RT 6880, 6884.) He also objected that its probative value was minimal since it could not be determined how the blood had been deposited, while it had an enormous potential for prejudice if the jury thought that the stain came from the victim. (35 RT 6881.) The trial court posited that one logical inference was that the blood was deposited by a human being; another logical inference was that it was deposited by an object. (35 RT 6884.) It found that for the purposes of a hypothetical, the assumption that it came directly from a human being was something that could perhaps be proved. (35 RT 6884-6885.) Therefore, it allowed the prosecutor to question Avilez about the matter.[11/] (35 RT 6883, 6889.)

In the presence of the jury, the prosecutor asked, "If you assume that the blood stain was deposited by a human being, do you have an opinion as to whether or not the individual would have been standing or either lying down or very close to the carpet at the time that blood stain was deposited." Avilez testified that the person who deposited that stain was either at or near the surface of the carpet. (35 RT 6890.) On cross-examination, he agreed that the stain could have been just as easily deposited by an object. (35 RT 6892.)

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11. The trial court did not permit Avilez to testify about the time it would have taken for a human being to have left the amount of blood that was found. (35 RT 6883.)

B. The Testimony Lacked Proper Foundation and Was Irrelevant

A trial court has no discretion to admit irrelevant evidence. (Evid. Code, § 350; *People v. Benavides* (2005) 35 Cal.4th 69, 90.) For an expert's testimony to be relevant, it must be based on matters that are supported by the record; it must not be based on factors that are speculative, remote, or conjectural. (*Pacific Gas & Electric Co. v. Zuckerman* (1987) 189 Cal.App.3d 1113, 1135-1136 [assumptions based on speculation have "no evidentiary value"].) In other words, an expert witness's out-and-out conjecture is not relevant evidence because it does not have "any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210; see *People v. Humphrey* (1996) 13 Cal.4th 1073, 1076, 1086 [acknowledging that expert testimony on battered women's syndrome must be relevant to a disputed issue in the case].)

Moreover, in order for an expert opinion to be admitted, it must meet certain foundational requirements. An expert may render opinion testimony based on facts given in hypothetical questions, but such questions must be rooted in facts shown by the evidence. (*People v. Ward* (2005) 36 Cal.4th 186, 209; *People v. Gardeley* (1996) 14 Cal.4th 605, 618.)

In *People v. Halvorsen* (2007) 42 Cal.4th 379 [64 Cal.Rptr.3d 721] this Court addressed the difference between hypothetical questions that are based upon the evidence and those that assume facts not in evidence. In that case, counsel attempted to ask if an expert had an opinion about his blood alcohol level if he assumed that the defendant had his last drink a certain period of time before the test was run. This Court found that the assumption – that defendant had not had a drink after a certain period of

time – was a fact not in evidence. (*Id.* at p. ___ [64 Cal.Rptr.3d at p. 749].) On the other hand, the prosecutor properly asked a hypothetical question that embraced facts already in evidence (the time of defendant's blood test and his blood-alcohol level) and asked the expert if this was inconsistent with the hypothesis about when the defendant had taken his last drink. (*Id.* at p. ___ [64 Cal.Rptr.3d at p. 750].) Accordingly, this Court has made clear that the assumption underlying a hypothetical question must be based only on matters that can be proved at trial.

The hypothetical question asked by the prosecutor in this case was similar to the improper question in *Halvorsen.* It asked the expert to offer an opinion based on an assumption not in evidence: that the blood stain was deposited directly by a human being. The trial court allowed the question simply because the prosecutor's assumption was a possible inference:

> One logical inference by the question is that the blood was deposited by a human being, and another logical inference would be it was deposited by an object. So I can't necessarily find asking him to assume for purposes of a hypothetical that the blood came from a person would necessarily be something that the People couldn't [prove].

(35 RT 6884-6885.) This was error. The issue before the trial court was not whether it could necessarily find that the source of the blood could be proved or disproved, but whether the factual assumption in the hypothetical was supported by the evidence in this case. (*People v. Ward*, *supra*, 36 Cal.4th at p. 209.)

The prosecutor offered no basis by which an expert could determine the source of the blood. The mere fact that blood was found on the carpet does not support the assumption that it was left by the victim. To the contrary, that the stain was isolated and in a separate area from other blood

spatters suggests that it was transferred from an object rather than left in the course of a violent attack. But whether the stain could have been made by a human being close to the rug or by an object laying on the ground could not be established. Therefore, the hypothetical was based on speculation and conjecture. It lacked a proper foundation and was irrelevant to the jury's determination. (*Pacific Gas & Electric Co. v. Zuckerman*, *supra*, 189 Cal.App.3d at pp. 1135-1136.)

C. The Opinion Was More Prejudicial than Probative

Assuming that the expert's testimony in response to the hypothetical question had some evidentiary value, the trial court abused its discretion by allowing evidence that was more prejudicial than probative. (35 RT 6881.) A trial court has discretion "to weigh the probative value of inadmissible evidence relied upon by an expert witness . . . against the risk that the jury might improperly consider it as independent proof of the facts recited therein." (*People v. Coleman* (1985) 38 Cal.3d 69, 91; *People v. Gardeley* (1996) 14 Cal.4th 605, 619.)

Evidence Code section 352 provides that a trial court "may exclude evidence if its probative value is substantially outweighed by the probability that its admission will . . . create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." This section applies to evidence that uniquely tends to evoke an emotional bias against defendant as an individual and that has very little effect on the issues. (*People v. Coddington* (2000) 23 Cal.4th 529, 588.) Evidence is substantially more prejudicial than probative if it poses an intolerable "risk to the fairness of the proceedings or the reliability of the outcome." (*People v. Alvarez* (1996) 14 Cal.4th 155, 204, fn. 14). Moreover, prejudice occurs if there is a "possibility" that the evidence will be used "by the trier of fact for a

purpose for which the evidence is not properly admissible." (*People v. Hoze* (1987) 195 Cal.App.3d 949, 954; see also *People v. Edelbacher* (1989) 47 Cal.3d 983, 1016.) This is precisely the type of evidence that was at issue in the present case.

The probative value of the Avilez's testimony was minimal. The hypothetical question and answer did not establish how the stain was left or where the victim was attacked. It did not establish any particular type of nexus between the stain and the crime. As Avilez acknowledged, the stain could have been left by an object. (35 RT 6892.)

However, the prejudicial impact of the testimony was enormous. As counsel explained, "there's a significant amount of prejudice that would come from the jury to think [that the stain] was necessarily left by the little girl." (35 RT 6881.) The prosecution's closing argument highlighted the prejudice inherent in such a scenario:

> Now imagine an 11-year old girl home alone after school. . . . She's injured from the bike fall. She's limping . . .. and out of nowhere there is Ronald Moore in her house, in her kitchen, maybe in the living room. What is the natural response to an 11-year old girl, knowing that her mom has been in arguments through the years. They're not on friendly terms. What would be her response to seeing this man?
>
> I submit to you . . . there would only be one response. The little girl screamed. She would have shown fear. . . . Her response would have been to get as far away from that man as she possibly could. And when she attempted to do that, when she, in all likelihood screamed or showed that fear, what did Ronald Moore do? He hit her.
>
> My god, now he's going to get caught. *And we know she went down. We know from those photographs in the living room of that pool of blood by the chair that she went down. And she*

> *was down for some period of time, enough to collect enough of that blood to form that pool, that amount of a blood stain.*
>
> There's the defendant's next opportunity to think about, now what? What am I going to do? I hit her. Do I leave? Do I not hurt her any further and leave or do I complete what I started? That period of time, however long it was, *where Nicole Carnahan was down on that floor on the carpet laying down . . . was the turning point.* And you know what his choice was.

(39 RT 7700-7702, emphasis added.)

To the best of Avilez's knowledge, there was no other blood stain in the living room. (35 RT 6691; see also 45 RT 8869 [penalty phase testimony of Avilez reminding jury about his testimony regarding the single blood stain in the living room].) Thus, from a hypothetical question about a small stain that may have been transferred from an object, the prosecutor was able to conjure a vivid and unsettling image of Nicole lying on the floor in a pool of blood and make it into the turning point of the crime.

It is likely that appellant's jury used Avilez's testimony in the same vivid and inflammatory fashion as the prosecutor. (See *Brewer v. Quarterman* (2007) ___ U.S.___ [127 S.Ct. 1706, 1712] [jurors likely to have accepted argument of prosecutor]; *United States v. Sherlock* (9th Cir. 1989) 865 F.2d 1069, 1080 [prosecution's use of evidence removed "any reasonable expectation" that jurors would limit their consideration to proper purposes].) Speculation fed speculation until it became the turning point in the case. The prejudice therefore was enormous. The trial court erred in allowing this testimony under section 352.

D. The Prejudice Inherent in this Testimony Requires Reversal of Both the Guilt and the Penalty Verdicts

The prosecutor's used Avilez's testimony to argue the premeditation and deliberation necessary for first degree murder under an express-malice theory. (39 RT 7700-7702.) The prosecutor's "pool of blood" scenario allegedly showed a break in the violence against the victim, giving appellant time to wilfully and deliberately complete the crime. Indeed, the prosecutor described it as the "turning point" of the crime. (39 RT 7702.) Moreover, the jury could have found that during that same break in the violence, appellant formed an intent to rob, making the felony-murder convictions more likely as well. Therefore, its importance cannot be underestimated. The image painted by the prosecutor of a little girl lying bleeding on the living room carpet while appellant weighed his options was particularly striking. No juror could be unmoved by such a picture. Therefore, it also undoubtedly inflamed jurors, making it impossible for them to return a fair and impartial verdict.

The trial court's errors violated appellant's statutory rights under Evidence Code sections 350, 352, and 801. Under state law, reversal is required if "it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error." (*People v. Watson* (1956) 46 Cal.2d 818, 836.) A "probability" in this context does not mean more likely than not, but merely a reasonable chance, more than an abstract possibility. (*College Hospital Inc. v. Superior Court* (1994) 8 Cal.4th 704, 715; cf. *Strickland v. Washington* (1984) 466 U.S. 668, 693-694, 697, 698 ["reasonable probability" does not mean "more likely than not," but merely "probability sufficient to undermine confidence in the outcome"].) Here, there is a reasonable probability that the jury

adopted the prosecutor's reasoning and used the improper assumption as the "turning point" of the crime. This undermines confidence in the verdict, requiring reversal.

The error here also violated appellant's constitutional rights.[12/] The United States Supreme Court has made clear that when a state court admits evidence that is "so unduly prejudicial that it renders the trial fundamentally unfair, the Due Process Clause of the Fourteenth Amendment provides a mechanism for relief." (*Payne v. Tennessee* (1991) 501 U.S. 808, 825.) Thus, where the inflammatory nature of the evidence "so plainly exceeds its evidentiary worth . . . a constitutional error has been made." (*Lesko v. Owens* (3rd Cir. 1989) 881 F.2d 44, 52; see also *Jammal v. Van de Kamp* (1991) 926 F.2d 918, 920.) Such evidence also renders the verdict unreliable under the Eighth Amendment by introducing extraneous matters that are based upon emotion rather than reason. (See *Beck v. Alabama* (1980) 447 U.S. 625, 638 [reliability standards apply to both guilt and penalty determinations in capital cases]; *People v. Cudjo* (1993) 6 Cal. 4th 585, 623 [Eighth Amendment requires heightened reliability].) Given the significant prejudice inherent in the prosecutor's assumptions about how the blood stain was formed, respondent cannot show that the error was harmless

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12. Although appellant's trial counsel did not specify constitutional grounds in his objections, the inflammatory nature of the evidence was presented to the trial court. The constitutional violations are therefore the resultant legal consequence of the trial court's ruling. This Court has held that constitutional violations that result from a trial court's ruling may be reviewed on appeal. (*People v. Partida* (2005) 37 Cal.4th 428, 438 [due process claim may be considered after an objection at trial based upon Evidence Code section 352].)

beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24.)

Even assuming that the error was harmless in the guilt phase, the penalty verdict must be reversed. It has been recognized that the penalty phase is a continuation of the guilt phase of a capital trial. (*Monge v. California* (1998) 524 U.S. 721, 732.) Thus, appellant's jurors were instructed to consider the evidence admitted in the guilt phase. (3 CT 789, 804; CALJIC Nos. 8.84.1, 8.85.) Avilez's testimony about the blood stain was particularly important in the penalty phase because he testified during that phase as well, making reference to his earlier testimony about the blood stain. (45 RT 8869; see also 50 RT 9826 [argument of prosecutor].) As discussed above, the vivid images inherent in the prosecutor's use of the testimony would have inflamed any juror. It changed the crime from an explosion of violence in the victim's bedroom to one that extended throughout the house and encompassed a period of reflection over a beaten and bloody child. There is an enormous difference between concentrated blows in a single room, as part of a single course of action, and a crime in which the victim was lying on the carpet until she was able to get up, only to be followed into the bedroom, where there was a second violent and fatal attack against her. This clearly affected the penalty verdict. The judgment against appellant must be reversed. (*People v. Ashmus* (1991) 54 Cal.3d 932, 965 [reversal if there is a reasonable possibility that error effected verdict]; *Chapman v. California*, *supra*, 386 U.S. at p. 24.)

III

THE EVIDENCE WAS INSUFFICIENT TO SUPPORT THE BURGLARY AND ROBBERY CONVICTIONS AND THE SPECIAL CIRCUMSTANCE FINDINGS

The prosecution alleged that appellant entered the Carnahan house with the intent to steal and committed homicide during the course of a robbery. The evidence in this case clearly established that property belonging to the victim or her family was found in appellant's house or on his property. It did *not* establish that appellant intended to take any items before the homicide was committed. Due process and the requirements for a reliable capital verdict under the federal and state constitutions demand more than speculation that appellant must have intended to commit burglary or rob the victim because he took various items from the Carnahan house. These allegations formed two of the prosecutor's theories of first degree murder, as well the basis for the burglary, robbery, and special circumstance convictions. Accordingly, the judgment against appellant must be reversed. (U.S. Const., 5th, 6th, 8th and 14th Amends.; Cal. Const., art. 1, §§ 7, 15.)

A. Due Process and the Eighth Amendment Require More Than Evidence Based on Surmise or Conjecture

The due process clause of the Fourteenth Amendment and article 1, section 15, of the California Constitution require that a conviction be supported by substantial evidence. (*Jackson v. Virginia* (1979) 443 U.S. 307, 319; *People v. Holt* (1997) 15 Cal.4th 618, 667.) The Eighth Amendment demands for heightened reliability in a capital case also require that this Court carefully review the evidence to ensure that the death sentence is not imposed on the basis of speculative evidence. (See *Edelbacher v. Calderon* (9th Cir. 1998) 160 F.3d 582, 585 [8th Amendment mandates heightened scrutiny].)

Although on appeal, this Court "must view the evidence in a light most favorable to respondent and presume in support of the judgment the existence of every fact the trier of fact could reasonably deduce from the evidence," it cannot affirm a judgment based on speculation or unwarranted inference. (*People v. Johnson* (1980) 26 Cal.3d 557, 576-577, citations omitted.) By definition,"substantial evidence" requires evidence and not mere speculation. (*People v. Perez* (1992) 2 Cal.4th 1117, 1113.) Thus, "a finding of first degree murder which is merely the product of conjecture and surmise may not be affirmed." (*People v. Rowland* (1982) 134 Cal.App.3d 1, 8-9.) As discussed below, the convictions in this case were based upon nothing more than conjecture and surmise and cannot be affirmed.

B. The Evidence Does Not Support a Finding of Robbery or Burglary

Appellant was convicted of first degree burglary and robbery, which also formed the basis for the special circumstance and the felony murder allegations. The prosecutor alleged appellant committed burglary by intending to steal items from the victim's house and committed robbery by murdering her in order to steal.

Robbery is the "felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear." (Pen. Code, § 211; see also CALJIC No. 9.40.) In the crime of robbery, there must be a joint operation of act or conduct and a specific intent to commit the crime. The "act of force or intimidation by which the taking is accomplished in robbery must be motivated by the intent to steal . . . ; if the larcenous purpose does not arise until after the force has been used against the victim, there is no

'joint operation of act and intent' necessary to constitute robbery." (*People v. Green* (1980) 27 Cal.3d 1, 54.)

First degree burglary similarly requires a specific intent. It requires a an offender to have entered a house with the intent to steal or to commit a felony. (Pen. Code, § 459.) The necessary intent must exist at the time of entry. (*People v. Montoya* (1994) 7 Cal.4th 1027, 1041.)

This Court has not hesitated to reverse convictions when there was no evidence that an intent to steal was formed before or during a murder. In *People v. Morris* (1988) 46 Cal.3d 1, the victim was found nude in a bathhouse after being shot. A witness saw shots being fired and the assailant running to a waiting car. The victim's credit card was used three days after the murder by a man who appeared to be the defendant. In reversing the robbery conviction and special circumstance finding, this Court stated:

> There is obviously nothing here from which the jury could reasonably infer that defendant deprived the victim of personal property in his possession by means of force or fear. [Footnote omitted.] The evidence merely shows that the assailant shot the victim, who was nude, and shortly thereafter a man who resembled the assailant was observed running from the scene to a waiting car. It is impossible to make a reasonable inference from these facts that the taking occurred either before or during the shooting, that the taking was from the person of the victim, and that the taking was accomplished by means of force or fear. . . . We may *speculate* about any number of scenarios that may have occurred on the morning in question. A reasonable inference, however, "may not be based on suspicion alone, or on imagination, speculation, supposition, surmise, conjecture or guesswork. . . . In the absence of any substantial evidence that the taking was accomplished either before or during the killing by means of force or fear, we must conclude that the evidence will not support a conviction of robbery. Absent substantial proof of

> the robbery, the special circumstance finding of robbery-murder must fall. [Citations.]"

(*Id.* at pp. 20-21; see also *People v. Marshall* (1997) 15 Cal.4th 1, 34 [there must be evidence that "reasonably inspires confidence" that the defendant killed the victim for the purpose of obtaining her property].)

The record below does not support the preliminary finding of either a burglary or robbery, let alone that the murder was in the commission and advancement of one of these crimes. While there was evidence that a theft occurred, no evidence established the temporal requirements for burglary or robbery – that the intent to steal was formed when appellant entered the Carnhan house and before or during the application of force.

To the contrary, the timing of the offense is more consistent with an unplanned, opportunistic theft after a killing than with a plan to steal. Dennis Sullivan testified that he saw appellant the afternoon of the killing, sometime after 3:00 p.m. or – as Sullivan told one of the investigating officers – around 4:00 p.m. (16 RT 6020; 36 RT 7241.) At that time, appellant had a knife, cylinder, and cane with him, but Sullivan did not see any blood on the items – such as that later found on the cane – that might have indicated the homicide had already been committed. (16 RT 6020-6027.) If appellant had intended to steal he could have broken into the Carnahan house when no one was at home. He would not have planned to wait until late in the afternoon at a time when any theft was likely to be interrupted by Rebecca Carnahan coming home from work, as occurred here. (27 RT 7261-7263.)

Moreover, appellant could not have intended to steal without taking into account how he would move items given his physical limitations. A planned offense – one done with the intent to steal – would have identified

what kind of items appellant wanted and how to move them from the Carnahans to a location where they would be hidden. The trail between appellant's house and the items were left on both sides of the fence, including things that were of no value to appellant, show that no such planning occurred. The haphazard nature of the offense was consistent with something that occurred on the spur of the moment.

The day before the crime, appellant was in such an agitated state that David True, an HIV educator who knew appellant, believed that he was a danger to himself and others. (37 RT 7262-7263.) Shortly before the crime was committed, Sullivan noticed that appellant was very intoxicated and had the shakes, so much so that he had trouble understanding appellant.[13/] (31 RT 6041-6042.) Assuming that appellant committed the murder, it is just as likely that it was the result of a spontaneous explosion of violence, with any theft as an afterthought, rather than appellant entering the Carnahan house with the intent to steal.

The prosecutor's own theories underscores the speculation underlying her case. On one hand, the prosecutor acknowledged that there was "nothing in the evidence" suggesting that appellant intended to commit murder. (39 RT 7695.) On the other hand, the prosecutor argued that appellant intended to rob Nicole because Sullivan saw appellant with a knife, cane, and cylinder. (39 RT 7695, 7698.) Nevertheless, there is no evidence to indicate that appellant had these items in order to rob or steal

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13. Sullivan told investigating officers that it appeared that appellant had taken "speed balls." (1 2d Supp. CT 80-81.)

since he was carrying them around the neighborhood in a routine visit to buy cigarettes.[14/]

The prosecutor argued that since a witness testified that the boards in the fence were removed by 2:15 pm in the afternoon, appellant must have intended to commit burglary or rob the victim. (39 RT 7692; see 33 RT 6564-6467 [testimony of Ronald Ruminer].) There was no evidence establishing who removed the boards. Both properties were large rural lots with room for a number of animals and outbuildings so there was not necessarily a connection between the fence and an intent to burglarize or rob the Carnahan house. Sullivan's testimony about the time-frame of appellant's visit to his house, as well as Nicole's school schedule, make it clear that appellant did not commit the crime at the time that the boards were removed. Even if this created a suspicion that appellant may have thought about some kind of wrong doing, it is not enough to support a conviction. (*People v. Redmond* (1969) 71 Cal.2d 745, 755 [evidence that raises a strong suspicion of guilt is not sufficient to support a conviction; suspicion is not evidence but merely raises a possibility].)

The prosecutor developed a compelling account of how Nicole might have left the back door unlocked, allowing appellant to enter the house with the intent to rob or steal. (39 RT 7700.) There is no evidence that appellant walked through an open door into the house with the intent to steal. Ultimately, even the prosecutor acknowledged that this was something that

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14. Appellant told investigating officers that he carried these weapons on him for self protection. (30 RT 5904.) This explanation was consistent with evidence introduced by the prosecutor in the penalty phase that showed that appellant had taken out a knife and cane during an argument at a methadone clinic, making it likely that appellant routinely carried such objects. (45 RT 8817.)

"might" have happened, or in other words, only a possible scenario, surmise, or conjecture. Moreover, there is no indication that appellant or anyone else forced their way into the victim's house. (31 RT 6061) Thus, even assuming that appellant committed the homicide, it is just as likely that Nicole opened the door to appellant (28 RT 5417) and something tripped inside him, causing an explosion of violence that was followed by an opportunistic theft.

This Court should review the sufficiency of the evidence in this case with particularly scrutiny because the trial court's incomplete instructions and counsel's misleading argument left the jury with no alternative but to convict appellant of the charged crimes. The trial court erroneously failed to instruct the jurors on theft as a lesser-included offense of robbery, leaving robbery as the only basis to convict appellant of the property crimes. (See Argument IV; *People v. Ramkeesoon* (1985) 39 Cal.3d 346, 350-351.) No pinpoint instruction was given on after-acquired intent, which would have clearly informed the jurors that they could not convict on robbery if the intent to steal rose after the assault. (See *People v. Webster* (1991) 54 Cal.3d 411, 443 [instruction appropriate upon the request of defendant].) Finally, appellant's trial counsel convoluted the burglary issue and equated it with theft when he told the jury that "it almost looks like this burglary was done in order to cover up a homicide." (40 RT 7813; see also 7815 ["It's almost like it was done . . . to make it look like a burglary

happened"].[15]) Accordingly, the jury was left with a single "all or nothing" choice between acquittal or conviction, even though a crucial element of the crimes was unsupported by the evidence. This Court should find that there is insufficient evidence to establish that appellant went into the house with an intent to steal or committed the homicide in order to take the victim's property.

C. There is Insufficient Evidence To Support the Special Circumstance Finding of Murder During Commission of a Burglary or Robbery

A special circumstance exists if a murder was committed while the defendant was engaged in the commission of a burglary or robbery. (Pen. Code, § 190.2, subd. (a)(17)(A),(G).) As discussed above, the evidence was not sufficient to establish that the murder was committed "during the commission or attempted commission" of a burglary or robbery for purposes of the special circumstance allegation.

In *People v. Morris*, *supra*, this Court emphasized that "whether or not a murder was committed *during* the commission of a robbery or other felony is not merely 'a matter of semantics or simple chronology.'" (*People v. Morris*, *supra*, 46 Cal.3d at p. 21, quoting *People v. Green*, *supra*, 27 Cal.3d at p. 60.) In order to establish the special circumstance it must be shown that the killing took place in order to "advance an independent felonious purpose." (*People v. Thompson* (1980) 27 Cal.3d 303, 322.)

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15. This issue is not being presented here as a claim of ineffective assistance of counsel, since the effectiveness of trial counsel is a matter to be considered on habeas corpus rather than in a direct appeal. (*People v. Catlin* (2001) 26 Cal.4th 81, 176.) Rather, it is to show that the appellant's jury was given no alternative other to convict appellant based on evidence that was nothing more than conjecture, surmise, or speculation.

Here, there is no evidence to suggest either the existence of an independent felonious purpose to commit burglary or robbery or that there is a necessary connection between the killing and the intent to further such a plan. As discussed above, if appellant took the items from the Carnahan house as an after-thought to the killings, then the taking was only a theft and not a burglary or robbery. (*People v. Ramkeesoon* (1985) 39 Cal.3d 346, 351.) Moreover, the murder was not in furtherance of a burglary or robbery. The mere fact that appellant may have taken some of the victim's property after her death did not support a finding that he harbored the requisite intent either prior to or during the killing. Under these circumstances, the special circumstances of burglary-murder and robbery-murder cannot be supported.

D. The Judgment Must Be Reversed

Even when viewed in the light most favorable to the judgment, the evidence is insufficient as a matter of law to support the burglary and robbery charges, the allegation of first degree felony murder based upon these charges and the special circumstance findings. Because mere speculation cannot support a conviction under California law, appellant's convictions on these charges and allegations thus violated state law. (See *People v. Marshall*, *supra*, 15 Cal.4th at p. 35.) These improper convictions also violated appellant's federal right to due process of law, because the "due process standard . . . protects an accused against conviction except upon evidence that is sufficient fairly to support a conclusion that every element of the crimes has been established beyond a reasonable doubt." (*Jackson v. Virginia*, *supra*, 443 U.S. at pp. 313-314.) Accordingly, appellant's convictions for burglary and robbery, along with the related

special circumstance allegations, must be reversed. (*People v. Morris*, *supra*, 46 Cal.3d at p. 22.)

1. The murder conviction must be reversed

The lack of evidence to support the burglary and robbery charges also requires that appellant's murder conviction be reversed. Since appellant's jury found him guilty of burglary and robbery, it necessarily considered the prosecution's felony murder theories as one basis for finding appellant guilty of first degree murder. (See 39 RT 7691-7693 [argument of prosecutor explaining felony murder]; 40 RT 7853, 7855 [trial court instructions on felony murder].) However, since the evidence was insufficient to sustain appellant's convictions of burglary and robbery, the felony murder theory was not a valid basis for convicting appellant of first degree murder. (See *People v. Lewis* (2001) 25 Cal.4th 610, 647 ["when the killer forms the intent to commit an independent felony only after delivering the fatal blow to the victim, the felony murder doctrine does not apply"].)

Even though the trial court instructed on first degree murder based on premeditation and deliberation, this Court cannot know whether the jury actually based its conviction of appellant on this ground or on the invalid felony murder theory. This Court has held that "when the prosecution presents its case to the jury on alternate theories, some of which are legally correct and others legally incorrect, and the reviewing court cannot determine from the record on which theory the ensuing general verdict of guilt rested, the conviction cannot stand." (*People v. Guiton* (1993) 4 Cal.4th 1116, 1122; see also *Zant v. Stephens* (1983) 462 U.S. 862, 879 ["a general verdict must be set aside if the jury was instructed that it could rely on any of two or more independent grounds, and one of those grounds

is insufficient, because the verdict may have rested exclusively on the insufficient ground"].) In this case at least two of the three theories of culpability were flawed. Moreover, the jury was not required to agree on which type of first degree murder was committed. Appellant's conviction of first degree murder was fundamentally tainted and must be reversed. (*Zant v. Stephens, supra,* 462 U.S. at p. 879.)

2. The death sentence must be set aside

Even assuming arguendo that the evidence was sufficient to sustain the murder conviction and special circumstance findings, this Court should reverse the death judgment. In *Beck v. Alabama* (1980) 447 U.S. 625, the High Court held that because death is a "different kind of punishment from any other," it is vitally important that any death verdict be based on a reliable sentencing determination, which includes a reliable guilt determination. (*Id.* at p. 637; see also *Woodson v. North Carolina, supra,* 428 U.S. at p. 305.) Thus, "the risk of an unwarranted conviction . . . cannot be tolerated in a case where the defendant's life is at stake." (*Beck v. Alabama, supra*, 447 U.S. at p. 637.) Because of the heightened need for reliability in fact-finding when a death sentence is involved, evidence which may meet the minimum requirements to uphold a guilt verdict on appeal, but which is equivocal, must be held insufficient to uphold a sentence of death.

This standard of heightened reliability is consistent with the protections that are applied under international law.[16] In 1984, the United Nations Economic and Social Council adopted a series of safeguards to protect the rights of those facing the death penalty. (See "Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty" (1984) ECOSOC Res. 1984/50, endorsed by the General Assembly in res. 39/118 of Dec 14, 1984.) These safeguards emphasize the importance of due process in death penalty cases and allow the death penalty only when the guilt of the person charged is based upon clear and convincing evidence "leaving no room for alternative explanation of the facts." (*Id.* at ¶ 4; see *Albert Wilson v. Philippines*, United Nations Human Rights Committee, Communication No. 868/1999, adopted Oct. 30, 2003, p. 5 [quoting above standard]; see also European Union, "Policy Towards Third Countries on the Death Penalty," General Affairs Council, June 29, 1998 [adopting standard].) These policies make clear that if the death penalty is imposed, it must be based upon the highest standards of evidence, without room for equivocal interpretation. This Court should adopt this standard in determining whether appellant's death sentence is supported by reliable evidence. (See *Trop v. Dulles* (1958) 356 U.S. 86, 100 [8th Amendment draws its meaning from standards of decency that mark the progress of a

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16. International law is "part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination." (*The Paquete Habana* (1900) 175 U.S. 677, 700.) It is determined by both treaty obligations and customary practices that define the law of nations. (*Siderman de Blake v. Republic of Argentina* (9th Cir. 1992) 965 F.2d 699, 715 [content of international law determined by reference "to the customs and usages of civilized nations, and, as evidence of these, to the works of jurists and commentators"].)

maturing society]; *Lawrence v. Texas* (2003) 539 U.S. 558, 572-573 [recognizing importance of international law in determining constitutional issues]; *Atkins v. Virginia* (2002) 536 U.S. 304 [122 S.Ct. 2242, 2249, fn. 21] [citing view of "world community"].)

Here, the prosecutor's theories on burglary and robbery leave room for alternative explanations. It is as likely that appellant committed theft after the homicide as it is that he entered the Carnahan house with the intent to steal and rob. Accordingly, the death judgment violates the restrictive nature of international standards and cannot meet the Eighth Amendment standards of heightened reliability. The judgment against appellant must be reversed.

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IV

THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY FAILING TO INSTRUCT APPELLANT'S JURY ON THEFT AS A LESSER INCLUDED CRIME TO ROBBERY

Appellant's jurors were instructed that they could convict appellant of first degree murder based upon a robbery-murder theory. (3 CT 751.) They were also instructed on a robbery-murder special circumstance (3 CT 764) and the substantive crime of robbery. (3 CT 768). The jurors, however, were not instructed on theft as a lesser included offense of robbery. The trial court's failure to instruct on theft gave the jurors no other option but to find appellant guilty of robbery once they determined that he was responsible for taking property.

The failure to instruct on theft was clear error under well-established California case law. It also deprived appellant of his federal constitutional rights to due process, trial by jury, and reliable guilt, special circumstance and penalty verdicts (U.S. Const., 5th, 6th, 8th, & 14th Amends.), as well as his state constitutional rights to due process and trial by jury (Cal. Const., art. I, §§ 7 & 15). The error requires reversal of appellant's convictions of robbery, the robbery-murder special circumstance finding, and the death verdict.

A. The Trial Court Erred in Failing to Instruct *Sua Sponte* on Theft as a Lesser Included Offense of Robbery

The trial court in this case did not instruct on theft as a lesser included offense to robbery. There is no question that a trial court must instruct on lesser included offenses, even in the absence of a request, whenever there is substantial evidence raising a question as to whether all of the elements of the charged offense are present. (*People v. Breverman*

(1998) 19 Cal.4th 142, 154; *People v. Bradford* (1997) 14 Cal.4th 1005, 1055-1056; *People v. Kelley* (1992) 1 Cal.4th 495, 529-530.) "Substantial evidence is evidence sufficient to 'deserve consideration by the jury,' that is, evidence that a reasonable jury could find persuasive. [Citation.]" (*People v. Barton* (1995) 12 Cal.4th 186, 201, fn. 8.)

The duty to instruct on lesser included offenses is necessary to ensure due process and the constitutional right to have the jury decide every material issue presented by the evidence. (*People v. Ramkeesoon* (1985) 39 Cal.3d 346, 351.) As the United States Supreme Court has explained, "Where one of the elements of the offense charged remains in doubt, but the defendant is plainly guilty of some offense, the jury is likely to resolve its doubts in favor of conviction." (*Keeble v. United States* (1973) 412 U.S. 205, 212.) Instructing on lesser included offenses shown by the evidence therefore avoids forcing the jury into an "unwarranted all-or-nothing choice." (*People v. Hughes* (2002) 27 Cal.4th 287, 365.)

This *sua sponte* obligation is not limited "to those offenses or theories which seem strongest on the evidence, or on which the parties have openly relied. On the contrary, the rule seeks the most accurate possible judgment by 'ensur[ing] that the jury will consider the full range of possible verdicts' included in the charge, regardless of the parties' wishes or tactics." (*People v. Breverman, supra,* 19 Cal.4th at p. 155, quoting *People v. Wickersham* (1982) 32 Cal.3d 307, 324.) Thus, the trial court must "instruct on lesser included offenses supported by the evidence even when they are 'inconsistent with the defense selected by the defendant.'" (*People v. Barton, supra*, 12 Cal.4th at p. 198, fn. 7, quoting *People v. Sedeno*

(1974) 10 Cal.3d 703, 717, fn. 7.[17]) In short, "*every* lesser included offense, or theory thereof, which is supported by the evidence, must be presented to the jury." (*People v. Breverman, supra,* at p. 155, original emphasis.)

Theft is a lesser included offense of robbery, which includes the additional elements of force or fear. (*People v. Ortega* (1998) 19 Cal.4th 686, 694; *People v. Bradford, supra*, 14 Cal.4th at p. 1055.) If the intent to steal arose only after the victim was assaulted, the robbery element of stealing by force or fear is absent and the offense committed is theft, not robbery. (*People v. Bradford, supra*, 14 Cal.4th at pp. 1055-1056; *People v. Kelly, supra,* 1 Cal.4th at pp. 528-529; *People v. Webster* (1991) 54 Cal.3d 411, 443; *People v. Turner* (1990) 50 Cal.3d 668, 690; *People v. Ramkeesoon, supra*, 39 Cal.3d at p. 351; *People v. Green* (1980) 27 Cal.3d 1, 54.)

Assuming that appellant committed the underlying homicide and took the victim's property, after-acquired intent was the only defense to the felony murder allegations, the special circumstance allegations, and property crimes charged in this case. As discussed above (Argument III), there was no direct evidence to establish that appellant intended to take the items from the Carnahan house at the time of the homicide. Both the timing and the nature of the theft, with items scattered across the two properties, seemingly without thought as to their value or usefulness, suggest a lack of planning or design. Thus, the jurors could have believed that appellant

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17. The duty to instruct on lesser offenses is so important, it exists even if the defendant expressly objects to the instruction (*People v. Barton, supra*, 12 Cal.4th at p. 195).

committed the homicide – perhaps because he was agitated or intoxicated – and stole property only as an afterthought.

This interpretation of the incident would have been consistent with CALJIC No. 2.01, which instructed the jurors that any reasonable interpretation of circumstantial evidence favorable to the defendant *must* be adopted. (3 CT 726.) Intent, of course, is inherently an issue of circumstantial evidence. (E.g.,, *People v. Gilbert* (1992) 5 Cal.App.4th 1372, 1380; *People v. Buckley* (1986) 183 Cal.App.3d 489, 494-495.) A reasonable interpretation of the evidence was that appellant formed the intent to steal after the homicide and had the jurors been property instructed, they would have been required to adopt it.

Appellant's jury never properly considered this issue because the instructions given on the intent necessary to establish robbery focused on the intent to take property rather than the timing of the intent. (CALJIC No. 9.40.2; 3 CT 769.) Thus, this case is similar to *People v. Kelly*, *supra*, 1 Cal.4th 495, in which this Court concluded that the trial court erred in failing to provide instructions on theft as a lesser included offense of robbery. The Court found it notable that the jury was not given an instruction highlighting the issue of "after-formed intent." (*Id.* at p. 530.) This Court emphasized that it could not have confidence that the jury "considered the question of 'after-formed intent' and rejected this 'mere theft' theory on its merits." (*Ibid.*) This Court therefore reversed the robbery count and related charges.

B. Reversal is Required

An error in failing to instruct on a lesser offense is prejudicial unless the factual question posed by the omitted instruction was necessarily resolved adversely to the defendant. (*People v. Turner* (1990) 50 Cal.3d

668, 690.) Here, the jury was instructed that burglary required appellant to have entered a building with the specific intent to steal. (40 RT 7865; 3 CT 772.) Although this Court has found that a burglary conviction makes harmless the failure to instruct on theft as a lesser included offense to robbery (*People v. Melton* (1988) 44 Cal.3d 713, 746 -747), this result should be reconsidered.

In *Melton*, this Court recognized that burglary and robbery are separate felonious acts that serve two different interests: robbery is a property crime involving an assault upon a person; burglary is an invasion of the home. (*Id* . at p. 767.) One can commit burglary by entering a house with the intent to steal without necessarily taking any items, but robbery focuses on the taking itself. Appellant's jury was given no alternative to account for the victim's property items that were found in appellant's house and yard other than robbery. Once the jury found that any property was taken, they were given no other options except to conclude that appellant committed the homicide with the intent to steal. "The omission of the theft instructions practically guaranteed robbery and felony murder convictions." (*People v. Ramkeesoon, supra,* 39 Cal.3d at p. 352.)

Appellant's conviction for burglary therefore does not mean that the jurors necessarily considered after-acquired intent as it related to robbery. Since the jurors had no other choice other than to conclude that appellant had the specific intent to take the victim's property for the purposes of robbery, it is likely that they simply transferred that intent to find that

appellant entered the house with the intent to steal.[18/] Thus, the lack of a theft instruction reduced the prosecutor's burden of proof by making it easier for the jury to assume appellant's underlying intent. This Court should therefore find that the error was prejudicial. At a minimum, the robbery charges must be reversed. (*People v. Kelly*, *supra*, 1 Cal.4th at p. 530.)

The Court should also reverse the death penalty in this case. Under the Eighth Amendment, the death penalty must be a reasoned moral response to the crimes at issue. (*Penry v. Lynaugh* (1989) 492 U.S. 302, 323.) The difference between robbery and theft is enormous, not only in terms of the punishment that is inflicted for these offenses, but the moral condemnation inherent in the two offenses. (See *United States v. Bass* (1971) 404 U.S. 336, 347 ["criminal punishment . . . represents the moral condemnation of the community"].) Clearly, it is one thing for a jury to find that property was stolen after a homicide was committed, but it is quite another if a person killed in order to take those items. The difference between the two crimes is particularly striking in this case because the victim was a young child and the items primarily were of minimal value (e.g., beer, a guitar case, shoelaces, margarine). To rob and kill a child for these items makes the crime much more heinous than if the jury had found that a theft occurred after the homicide. Because appellant's jurors were given no other choice other than robbery to account for the property taken

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18. Trial counsel's argument that "it almost looks like this burglary was done in order to cover up a homicide," appears to equate "burglary" with "theft," making it all the more likely that appellant's jurors did not have a clear understanding of the differences between the theft, burglary, and robbery. (40 RT 7813.)

from the victim's house, the weight of the aggravation – the moral judgment against appellant – was increased substantially. Accordingly, this Court should find that the error compromised the reliability of the penalty verdict and requires reversal. (*Chapman v. California* (1967) 386 U.S. 18, 24 [reversal required since respondent cannot show the error was harmless beyond a reasonable doubt]; *People v. Robertson* (1982) 33 Cal.3d 21, 54 [substantial error affecting penalty phase requires reversal].)

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V

THE CALJIC INSTRUCTIONS DEFINING THE PROCESS BY WHICH JURORS REACH A VERDICT ON LESSER OFFENSES SKEWED THEIR DELIBERATIONS TOWARD FIRST DEGREE MURDER

The trial court instructed appellant's jurors that if they agreed that appellant committed the homicide, they must "unanimously" agree that there was a reasonable doubt about the degree of murder (40 RT 7856; 3 CT 758; CALJIC No. 8.71) or whether the crime was murder or manslaughter (40 RT 7856; 3 CT 759; CALJIC No. 8.72) before giving appellant the benefit of that doubt.[19/] These instructions required the jurors to reject a lesser offense unless there was a unanimous agreement. Accordingly, a juror who believed that appellant was guilty of some offense, but not necessarily first degree murder, would also believe that first degree murder must apply in the face of any disagreement. In other words, first degree murder became the default verdict. The instructions skewed the jury's deliberations toward first degree murder and lowered the prosecution's burden of proof in violation of appellant's rights to due process and a trial

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19. At the time of trial, CAJIC 8.71 read, "If you are convinced beyond a reasonable doubt and unanimously agree that the crime of murder has been committed by a defendant, but you unanimously agree that you have a reasonable doubt whether the murder was of the first or of the second degree, you must give defendant the benefit of that doubt and return a verdict fixing the murder as of the second degree." (6th ed., 1996.)

CALJIC No. 8.72 similarly provided, "If you are convinced beyond a reasonable doubt and unanimously agree that the killing was unlawful, but you unanimously agree that you have a reasonable doubt whether the crime is murder or manslaughter, you must give the defendant the benefit of that doubt and find it to be manslaughter rather than murder." (6th ed., 1996.)

by jury. (U.S. Const., 5th, 6th and 14th Amends; Cal. Const, art. I, §§ 7, 15, 16; .)

California Penal Code section 1097 provides that if there is a reasonable doubt about the degree of the crime a defendant has committed, he or she may be convicted only of the lowest degree. Under this principle, if the prosecution proved a crime had been convicted but there was doubt about the nature of the offense, an individual juror must vote for the lesser offense. Thus, CALJIC No. 8.71 "explains the process jurors must go through to determine the degree of murder." (*People v. Pescador* (2004) 119 Cal.App.4th 252, 256.) Similarly, CALJIC No. 8.72 explains the process for jurors to decide between murder and manslaughter. (*Ibid.*)

Previous versions of CALJIC instructed jurors to give a defendant the benefit of the doubt without reference to whether they unanimously agreed. (See CALJIC Nos. 8.71, 8.72, 5th ed., 1988.[20]) This was in keeping with this Court's long-standing rule that jurors must be instructed that "if they entertain a reasonable doubt as to which offense has been committed, they must find the defendant guilty only of the lesser offense."

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20. CALJIC No. 8.71 formerly provided, "If you are convinced beyond a reasonable doubt that the crime of murder has been committed by a defendant, but you have a reasonable doubt whether such murder was of the first or second degree, you must give a defendant the benefit of that doubt and return a verdict fixing the murder as of the second degree."

CALJIC No. 8.72 formerly stated, "If you are satisfied beyond a reasonable doubt that the killing was unlawful, but you have a reasonable doubt whether the crime is murder of manslaughter, you must give the defendant the benefit of such doubt and find it to be manslaughter rather than murder."

(*People v. Dewberry* (1959) 51 Cal.2d 548, 555.) The 1996 revision significantly changed this process by instructing jurors to vote for a lesser degree or offense only if they unanimously agree. In other words, under the revised instructions before jurors give a defendant the benefit of the doubt, they must first unanimously agree that there is a reasonable doubt. If some, but not all, jurors believed that there was reasonable doubt about the nature of the offense, the instruction directs them to first degree murder. Thus, first degree murder becomes the default verdict if there is any disagreement.

The revised instructions appear to be designed to force unanimity. While the ultimate verdict must be unanimous, it is the *process* by which a juror reaches such a verdict that is at issue. If jurors reach a unanimous decision that a defendant is not guilty of murder or first degree murder, than the *Dewberry* instructions would not be required since the jury would theoretically go on to decide the lesser offenses. However, the instructions are important because without them, a jury is unlikely return an outright acquittal:

> True, if the prosecution has not established beyond a reasonable doubt every element of the offense charged, and if no lesser offense instruction is offered, the jury must, as a theoretical matter, return a verdict of acquittal. But a defendant is entitled to a lesser offense instruction – in this context or any other – precisely because he should not be exposed to the substantial risk that the jury's practice will diverge from theory. Where one of the elements of the offense charged remains in doubt, but the defendant is plainly guilty of some offense, the jury is likely to resolve its doubts in favor of conviction.

(*Keeble v. United States* (1973) 412 U.S. 205, 212-213.)

The distinction between theory and practice is important. In *United States v. Jackson* (9th Cir. 1984) 726 F.2d 1466, there was overwhelming

evidence that the defendant had committed a crime, but a rational jury may have had doubt about the nature of the offense. The trial court instructed the jury that if it unanimously found the defendant to be not guilty of the crime charged, then it should determine the lesser offense. (*Id.* at p. 1469, fn. 1.) The Ninth Circuit recognized that if jurors were unable to reach a unanimous verdict on any charge, in theory the result would be a mistrial.

> Practically, however, in this case the risk was substantial that jurors harboring a doubt as to defendant's guilt of the greater offense but at the same time convinced that defendant had committed some offense might wrongly yield to the majority and vote to convict of the greater offense rather than not convict defendant of any offense at all.

(*Id.* at p. 1470; see also *United States v. Warren* (9th Cir. 1993) 984 F.2d 325, 332 [instructions should have made clear to the jury that it was not required to reach a unanimous verdict of acquittal on the greater charge before reaching the lesser included offense].)

In *People v. Pescador, supra*, 119 Cal.App.4th 252, the Court of Appeal upheld the use of the 1996 revisions to CALJIC Nos. 8.71 and 8.72 by relying on other instructions given by the trial court to find that the jurors would not have applied the challenged instructions in an incorrect manner. In particular, jurors in *Pescador* were instructed that if they had a reasonable doubt about whether the crime was first or second degree murder, "you must find him guilty of that crime in the second degree." (*Id.* at p. 257, quoting CALJIC No. 17.11.) Similarly, the jury was instructed that the prosecutor had the burden to establish that a killing is murder and not manslaughter and to prove each of the elements of murder beyond a reasonable doubt. (*Ibid.*, citing CALJIC No. 8.50.) The jury was also instructed that the defendant was entitled to the individual opinion of each

juror. (*Ibid.*, citing CALJIC No. 17.40.) The court found that these instructions, taken as a whole, would not have misled the jury.[21] (*Id.* at p. 258.)

Appellant did not have the benefit of the most important of the instructions cited in *Pescador*. CALJIC No. 8.50, which explains the difference between murder and voluntary manslaughter, did not apply in this case. CALJIC No. 17.11 also was not given, although it would have provided the jury with clear language similar to the previous versions of CALJIC Nos. 8.71 and 8.72.[22] Since these instructions were vital in *Pescador*, their exclusion in the present case makes the error in this case even more apparent.

Although appellant's jurors were instructed under CALJIC No. 17.40 to give appellant the benefit of their individual determination (2 CT 781), this begs the issue. In appellant's case, jurors would have understood that the challenged instruction permitted them to find second degree murder

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21. The court of appeal also noted that this Court had upheld the constitutionality of CALJIC Nos. 8.71 and 8.72. (*People v. Pescador*, *supra*, 119 Cal.App.4th 252, 257, citing *People v. Dennis* (1998) 17 Cal.4th 468, 536-537; *People v. Morse* (1964) 60 Cal.2d 631, 656-657.) However, in both of these cases, the Court considered the previous version of these instructions that correctly stated the law, and not the revisions at issue in the present case.

22. CALJIC No. 17.11 provides, "If you find the defendant guilty of the crime of _____, but have a reasonable doubt as to whether it is of the first or second degree, you must find [him][her] guilty of that crime in the second degree." This instruction must be given *sua sponte* when a crime has separate degrees. (See CALJIC No. 17.11, use note citing *People v. Dewberry*, *supra*, 51 Cal.2d at pp. 555-557; see also *People v. Aikin* (1971) 19 Cal.App.3d 685, 703-704 [sua sponte instruction].) That the instruction retained its simple, straight-forward language makes the decision to revise CALJIC Nos. 8.71 and 8.72 particularly mystifying.

or manslaughter only if there was a unanimous doubt as to the nature of the offense. As discussed above, absent unanimity, the verdict defaulted to murder and murder in the first degree. In the absence of a unanimous decision, jurors reasonably believed that first degree murder was the only choice available to them. This verdict became the default choice.

The instructions given in this case violated due process and lightened the prosecution's burden of proof. Without direction on what to do in the case of non-unanimous doubt, "the jury will likely fail to give full effect to the reasonable doubt standard, resolving its doubts in favor of conviction." (*Keeble v. United States*, *supra*, 412 U.S. at pp. 212-213.) Indeed, the lack of clear direction in this case "reasonably may be taken to have distorted the fact-finding process." (*Villafuerte v. Lewis* (9th Cir. 1996) 75 Cal.3d 1330, 1339 [failure to include lesser offense in charge to the jury]; *Cool v. United States* (1972) 409 U.S. 100, 104 [instruction that reduces burden of prosecution is "plainly inconsistent with the constitutionally rooted presumption of innocence").] Accordingly, it resulted in the kind of juror confusion that implicates constitutional standards. (See *Smith v. Texas* (2007) ___ U.S. ___ [127 S.Ct. 1686, 1699] [recognizing that instructions can create "jury-confusion error"].)

The error affected the fundamental framework of appellant's trial and requires reversal. (*Arizona v. Fulminante* (1991) 499 U.S. 279, 309-310.) In *Sullivan v. Louisiana* (1993) 508 U.S. 275, the trial court erroneously instructed the jury on the definition of reasonable doubt. The high court explained that there are certain errors that defy traditional harmless error review. These are errors that cannot be measured by weighing the strength of the evidence. "[W]here the instructional error consists of a misdescription of the burden of proof . . . . a reviewing court

can only engage in pure speculation – its view of what a reasonable jury would have done. And when it does that, "the wrong entity judge[s] the defendant guilty." (*Id.* at p. 281, quoting *Rose v. Clark* (1986) 478 U.S. 570, 578.) Thus, a deprivation of an important right "with consequences that are necessarily unquantifiable and indeterminate, unquestionably qualifies as 'structural error.'" (*Id.* at pp. 281-282.)

Here, appellant's mental state was a key issue in this case. He presented evidence that he was extremely agitated the day before the crime (37 RT 7258, 7260, 7263), very intoxicated just before the crime (31 RT 6041-6042), and had numerous drugs in his system when he was tested after his interrogation by the deputies (37 RT 7251-7253). Under the challenged instructions, a rational juror could have concluded that there was a reasonable doubt about the mental state required for first degree murder, but abandoned that position for lack of unanimous support. As in *Sullivan*, a harmless error analysis would require this Court to speculate about the verdict, a factor outside the role of appellate review. Accordingly, this Court should find that the error was structural and that reversal is required. (*Sullivan v. Louisiana*, *supra*, 508 U.S. at pp. 280-282.)

Even assuming that harmless error analysis is applied, this Court can have no confidence about the jury's application of CALJIC Nos. 8.71 and 8.72, particularly in light of the trial court's failure to give the clarifying instructions relied upon in *Pescador*. Given that the prosecution presented significant evidence that linked appellant to the crime scene, the evidence relating to his mental state and his ability to form a specific intent was of primary importance. The challenged instructions undoubtedly affected how the jury viewed that evidence and contributed to the verdict of first degree

murder. The errors were not harmless beyond a reasonable doubt. Reversal is required. (*Chapman v. California* (1967) 386 U.S. 18, 24.)

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VI

THE TRIAL COURT ERRED IN INSTRUCTING THE JURY ON FELONY MURDER AND FAILING TO REQUIRE THE JURY TO AGREE UNANIMOUSLY ON WHETHER APPELLANT HAD COMMITTED A PREMEDITATED MURDER OR A FELONY MURDER BEFORE RETURNING A VERDICT FINDING HIM GUILTY OF MURDER IN THE FIRST DEGREE

Count one of the information charged appellant with first degree murder based on express malice, which alleged that appellant committed a murder "willfully . . . deliberately, with malice aforethought and with premeditation." (1 CT 65.) The trial court instructed appellant's jurors not only on first degree premeditated murder (CALJIC No. 8.20; 3 CT 753; 40 RT 7854), but also on first degree felony murder predicated on robbery and burglary (CALJIC No. 8.21; 3 CT 754; 40 RT 7855). The trial court also instructed the jurors that if they found that appellant had committed murder, they had to agree unanimously on whether appellant was guilty of first degree murder or second degree murder. (CALJIC No. 8.71; 3 CT 758; 40 RT 7856-7857.) The trial court did not instruct the jury that it had to agree unanimously on which type of first degree murder appellant had committed.

The instructions on felony murder were erroneous, and the resulting convictions of first degree murder must be reversed because the information did not charge appellant with felony murder. Moreover,
the failure to require the jury to agree unanimously as to whether appellant had committed a premeditated murder or a first degree felony murder was erroneous, and the error denied appellant his right to have all elements of the crime of which he was convicted proved beyond a reasonable doubt, his right to a unanimous jury verdict and his right to a fair and reliable

determination that he committed a capital offense. (U.S. Const., Amends. 6, 8 & 14; Cal. Const., art. I, §§ 7, 15, 16 & 17.)

A. Felony Murder and Malice Murder are Two Different Crimes with Different Elements

Appellant acknowledges that this Court has rejected the claim that a defendant cannot be convicted of felony murder if he is charged only with express malice first degree murder. (See, e.g. *People v. Hughes* (2002) 27 Cal.4th 287, 369-370.) This Court has also rejected claims that the jury cannot return a valid verdict of first degree murder without first agreeing unanimously as to whether the defendant committed a premeditated murder or a felony murder. (See, e.g., *People v. Nakahara* (2003) 30 Cal.4th 705, 712-713.) However, appellant submits that these conclusions are erroneous and should be reconsidered, particularly in light of recent decisions of the United States Supreme Court.

This Court consistently has held that the elements of first degree premeditated murder and first degree felony murder are not the same. In the watershed case of *People v. Dillon* (1983) 34 Cal.3d 441, this Court explained, "In every case of murder other than felony murder the prosecution undoubtedly has the burden of proving malice as an element of the crime. [Citations.]" (*Id.* at p. 475.) The element of malice distinguishes the two crimes:

> It follows from the foregoing analysis that the two kinds of first degree murder in this state differ in a fundamental respect: in the case of deliberate and premeditated murder with malice aforethought, the defendant's state of mind with respect to the homicide is all important and must be proved beyond a reasonable doubt; in the case of first degree felony murder it is entirely irrelevant and need not be proved at all. . . . [This is a] profound legal difference.

(*Id.* at pp. 476-477, fn. omitted.) Accordingly, "the two kinds of murder [felony murder and malice murder] are not the 'same' crimes and malice is not an element of felony murder." (*Id.* at p. 476, fn. 23)

In subsequent cases, this Court retreated from its conclusion that felony murder and premeditated murder are not the same crime (see, e.g., *People v. Nakahara*, *supra*, 30 Cal.4th at p. 712["[f]elony murder and premeditated murder are not distinct crimes"]), but it has continued to hold that the elements of those crimes are not the same. Thus, in *People v. Carpenter* (1997) 15 Cal.4th 312, 394, this Court explained that the language from *Dillon*, "meant that the elements of the two types of murder are not the same." Similarly, the Court has declared that "the elements of the two kinds of murder differ" (*People v. Silva* (2001) 25 Cal.4th 345, 367) and that "the two forms of murder [premeditated murder and felony murder] have different elements" (*People v. Nakahara*, *supra*, 30 Cal.4th at p. 712; *People v. Kipp* (2001) 26 Cal.4th 1100, 1131).[23/]

"Calling a particular kind of fact an 'element' carries certain legal consequences." (*Richardson v. United States* (1999) 526 U.S. 813, 817.) Examination of the elements of the crimes at issue is the method used both to determine whether crimes that carry the same title are in reality different and distinct offenses (see *People v. Henderson* (1963) 60 Cal.2d 482, 502-503 (dis. opn. of Schauer, J.)) and also to determine to which facts the constitutional requirements of trial by jury and proof beyond a reasonable doubt apply (see *Jones v. United States* (1999) 526 U.S. 227, 232).

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23. The prosecutor in this case acknowledged that first degree malice murder and felony murder have different elements that are necessary for the jury to determine. (40 RT 7830.)

Comparison of the elements of the crimes at issue is the traditional method used by the United States Supreme Court to determine if those crimes are different or the same. The question first arose as an issue of statutory construction in *Blockberger v. United States* (1932) 284 U.S. 299, when the defendant asked the Court to determine if two sections of the Harrison Narcotic Act created one offense or two. The Court concluded that the two sections described different crimes, and explained its holding as follows:

> Each of the offenses created requires proof of a different element. The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of an additional fact that the other does not.

(*Id.* at p. 304, citing *Gavieres v. United States* (1911) 220 U.S. 338, 342.)

Later, the "elements" test announced in *Blockberger* was elevated to a rule of constitutional dimension. It is now the test used to determine what constitutes the "same offense" for purposes of the Double Jeopardy Clause of the Fifth Amendment (*United States v. Dixon* (1993) 509 U.S. 688, 696-697), the Sixth Amendment right to counsel (*Texas v. Cobb* (2001) 532 U.S. 162, 173), the Sixth Amendment right to trial by jury, and the Fourteenth Amendment right to proof beyond a reasonable doubt. (*Monge v. California* (1998) 524 U.S. 721, 738 (dis. opn. of Scalia, J.); see also *Sattazahn v. Pennsylvania* (2003) 537 U.S. 101, 111.)

Malice murder and felony murder are defined by separate statutes and "each . . . requires proof of an additional fact that the other does not." (*Blockberger v. United States*, *supra*, 284 U.S. at p. 304.) Malice murder requires proof of malice and, if the crime is to be elevated to murder of the

first degree, proof of premeditation and deliberation; felony murder does not. Felony murder requires the commission of or attempt to commit a felony listed in Penal Code section 189 and the specific intent to commit that felony; malice murder does not. (Pen. Code, §§ 187, 189; *People v. Hart* (1999) 20 Cal.4th 546, 608-609.)

Therefore, it is sophistry to assert, as this Court did in *People v. Carpenter*, *supra*, 15 Cal.4th 312, that the language in *Dillon* on which appellant relies, "*only* meant that the *elements* of the two types of murder are not the same." (*Id.* at p. 394, first italics added.) If the elements of malice murder and felony murder are different, as *Carpenter* acknowledges they are, then malice murder and felony murder are different crimes. (*United States v. Dixon*, *supra*, 509 U.S. at p. 696.)

Moreover, this conclusion cannot be avoided by recharacterizing premeditation and the facts necessary to invoke the felony murder rule as "theories" rather than "elements" of first degree murder. (See, e.g., *People v. Millwee* (1998) 18 Cal.4th 96, 160, citing *Schad v. Arizona* (1991) 501 U.S. 624.) First, in contrast to the circumstances in *Schad*, where the Arizona courts had determined that "premeditation and the commission of a felony are not independent elements of the crime, but rather are mere means of satisfying a single mens rea element" (*Schad v. Arizona*, *supra*, 501 U.S. at p. 637), the California courts repeatedly have characterized premeditation as an element of first degree premeditated murder. (See, e.g., *People v. Thomas* (1945) 25 Cal.2d 880, 899 [premeditation and deliberation are essential elements of premeditated first degree murder]; *People v. Gibson* (1895) 106 Cal. 458, 473-474 [premeditation and deliberation are necessary elements of first degree murder]; *People v. Albritton* (1998) 67 Cal.App.4th 647, 654, fn. 4 [malice and premeditation are the ordinary elements of first

degree murder].) The specific intent to commit the underlying felony similarly has been characterized as an element of first degree felony murder. (*People v. Jones* (2003) 29 Cal.4th 1229, 1257-1258.)

Moreover, this Court has recognized that it was the intent of the Legislature to make premeditation an element of first degree murder. In *People v. Stegner* (1976) 16 Cal.3d 539, it declared:

> We have held, "By conjoining the words 'willful, deliberate, and premeditated' in its definition and limitation of the character of killings falling within murder of the first degree, the Legislature apparently emphasized its intention to require as an element of such crime substantially more reflection than may be involved in the mere formation of a specific intent to kill." [Citation.]

(*Id.* at p. 545, quoting *People v. Thomas*, *supra*, 25 Cal.2d at p. 900.)[24/]

As the United States Supreme Court has explained, *Schad* held only that jurors need not agree on the particular means used by the defendant to

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24. Specific intent to commit the underlying felony, the mens rea element of first degree felony murder, is not specifically mentioned in Penal Code section 189. However, ever since its decision in *People v. Coefield* (1951) 37 Cal.2d 865, 869, this Court has held that such an intent is required (see, e.g., *People v. Hernandez* (1988) 47 Cal.3d 315, 346, and cases there cited; *People v. Dillon*, *supra*, 34 Cal.3d at p. 475), and that authoritative judicial construction "has become as much a part of the statute as if it had been written by the Legislature" (*People v. Honig* (1996) 48 Cal.App.4th 289, 328; accord, *Winters v. New York* (1948) 333 U.S. 507, 514; *People v. Guthrie* (1983) 144 Cal.App.3d 832, 839). Furthermore, Penal Code section 189 has been amended and reenacted several times in the interim, but none of the changes purported to delete the requirement of specific intent, and "There is a strong presumption that when the Legislature reenacts a statute which has been judicially construed it adopts the construction placed on the statute by the courts." (*Sharon S. v. Superior Court* (2003) 31 Cal.4th 417, 433, citations and internal quotation marks omitted.)

commit the crime or the "underlying brute facts" that "make up a particular element," such as whether the element of force or fear in a robbery case was established by the evidence that the defendant used a knife or by the evidence that he used a gun. (*Richardson v. United States*, *supra*, 526 U.S. at p. 817.) This case involves the elements specified in the statute defining first degree murder (Pen. Code, § 189), not the particular means or the "underlying brute facts" which may be used at times to establish those elements.

No matter how they are labeled, premeditation and the facts necessary to support a conviction of first degree felony murder are facts that operate as the functional equivalent of elements of the crime of first degree murder, and, if found, increase the maximum sentence beyond the penalty that could be imposed on a conviction for second degree murder. (Pen. Code, §§ 189, 190, subd. (a).)

Finally, at least one indisputable "element" is involved: malice. First degree premeditated murder requires malice while felony murder does not. "The mental state required [for first degree premeditated murder] is, of course, a deliberate and premeditated intent to kill with malice aforethought [citations]." (*People v. Hart*, *supra*, 20 Cal.4th at p. 608; accord, *People v. Visciotti* (1992) 2 Cal.4th 1, 61.) Malice is a true "element" of murder. This Court should accordingly find that the first degree malice murder and felony murder are two distinct crimes.

B. The Trial Court Lacked Jurisdiction to Try Appellant on Felony Murder Because the Information Charged Appellant Only with Malice Murder

Appellant was charged only with first degree malice murder in violation of Penal Code section 187.[25/] After a defendant pleads not guilty, "the court lacks jurisdiction to convict him of an offense that is neither charged nor necessarily included in the alleged crime." (*People v. Lohbauer* (1981) 29 Cal.3d 364, 368.) This fundamental rule of subject matter jurisdiction has been recognized in California for many years:

> A person cannot be convicted of an offense (other than a necessarily included offense) not charged against him by indictment or information, whether or not there was evidence at his trial to show that he had committed that offense. [Citations.]

(*In re Hess* (1955) 45 Cal.2d 171, 174-175; see also *People v. Granice* (1875) 50 Cal. 447, 448-449 [defendant could not be tried for murder after the grand jury returned an indictment for manslaughter]; *People v. Murat* (1873) 45 Cal. 281, 284 [an indictment charging only assault with intent to murder would not support a conviction of assault with a deadly weapon].)

Nevertheless, this Court has held that a defendant may be convicted of first degree murder even though the indictment or information charged only murder with malice in violation of Penal Code section 187. (See, e.g., *People v. Hughes, supra,* 27 Cal.4th 287, 368-370; *Cummiskey v. Superior Court* (1992) 3 Cal.4th 1018, 1034.) These decisions, and the cases on which they rely, rest explicitly or implicitly on the premise that all forms of murder are defined by Penal Code section 187, so that an accusation in the

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25. The information alleged the elements of first degree murder (i.e., that the crime was committed wilfully, deliberately, with malice aforethought) and the count as being "Murder: First Degree." (1 CT 65.)

language of that statute adequately charges every type of murder, making specification of the degree, or the facts necessary to determine the degree, unnecessary. As discussed above, this reasoning is undermined because the elements necessary to convict appellant of felony murder and malice murder are different, making it imperative that the prosecution have charged appellant with the specific crime at issue.

Here, count one of the information cited Penal Code section 187 and expressly described first degree murder based only on premeditation, deliberation, and malice. By instructing the jury that it could convict appellant of an uncharged crime of felony murder under Penal Code section 189, over which it had no jurisdiction, the trial court violated appellant's right to due process of law. (U.S. Const., Amend. 14; Cal. Const., art. I, §§ 7 and 15.) "Conviction upon a charge not made would be sheer denial of due process." (*DeJonge* v. *Oregon* (1937) 299 U.S. 353, 362 .) The due process violation cannot be avoided by a finding that the evidence would have supported a conviction for felony murder if that charge had been properly made. (*Turner* v. *New York* (1967) 386 U.S. 773, 774 ; *In re Hess*, *supra*, 45 Cal.2d at pp. 174-175.)

> "[W]e cannot be concerned with whether the evidence proves the commission of some other crime, for it is as much a denial of due process to send an accused to prison following conviction for a charge that was never made as it is to convict him upon a charge for which there is no evidence to support that conviction."

(*Garner* v. *Louisiana* (1961) 368 U.S. 157, 164, fn. omitted .) Therefore, regardless of the state of the evidence at the close of trial, the trial court violated appellant's rights to due process and a reliable capital verdict under

the Eighth Amendment by permitting the jury to convict him of an uncharged crime beyond the jurisdiction of the court.

The error also implicated appellants Sixth Amendment rights to notice, which requires specific pleading in this context. In *Apprendi v. New Jersey* (2000) 530 U.S. 466, the United States Supreme Court held that "*any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment*, submitted to a jury and proved beyond a reasonable doubt." (*Id.* at p. 476, italics added, citation omitted.[26]) The wording of an indictment must "fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offence intended to be punished." (*Hamling v. United States* (1974) 418 U.S. 87, 117.) The facts necessary to bring a killing within the first degree felony murder rule (commission or attempted commission of a felony listed in Penal Code section 189 together with the specific intent to commit that crime) are facts which increase the maximum penalty for the crime of murder. Accordingly, it must have been charged in the information.

Instructing the jury on an uncharged crime went to the core of the trial court's jurisdiction. It is structural error that affected the framework of appellant's trial and is not susceptible to ordinary harmless error analysis. Accordingly, the judgment must be reversed. (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 280.)

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26. Appellant recognizes that this Court has not applied *Apprendi* to capital cases. However, the recent Supreme Court decision in *Cunningham v. California* (2007) ___ U.S. ___[127 S.Ct. 856, 868] makes clear that the rationale underlying *Apprendi* applies with equal force to California's capital sentencing scheme. (See Argument IX, subd.(E)(1).)

C. The Trial Court Erred in Failing to Require Unanimous Agreement as to whether Appellant Committed Malice Murder or Felony Murder

The facts necessary to convict a defendant are determined by examining the elements of a crime. (*Monge v. California*, *supra*, 524 U.S. at p. 738 (dis. opn. of Scalia, J.); see *People v. Sakarias* (2000) 22 Cal.4th 596, 623.) Moreover, the right to trial by jury attaches even to facts that are not "elements" in the traditional sense if a finding that those facts are true will increase the maximum sentence that can be imposed. "[A]ny fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt." (*Apprendi v. New Jersey, supra*, 530 U.S. 466, 476; accord, *Blakely v. Washington* (2004) 542 U.S. 296, 301; *Cunningham v. California* (2007) ___ U.S. ___[127 S.Ct. 856, 868].)

The right to a unanimous verdict in criminal cases is secured by the state Constitution and state statutes (Cal. Const., art. I, § 16; Pen. Code, §§ 1163, 1164; *People v. Collins* (1976) 17 Cal.3d 687, 693) and protected from arbitrary infringement by the Due Process Clause of the Fourteenth Amendment to the United States Constitution (See *Hicks v. Oklahoma* (1980) 447 U.S. 343, 346; *Vitek v. Jones* (1980) 445 U.S. 480, 488).

Because this is a capital case, the right to a unanimous verdict is also guaranteed by the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. (See *Schad v. Arizona* (1991) 501 U.S. 624, 630-631 (plur. opn.) [leaving this question open].) The purpose of the unanimity requirement is to insure the accuracy and reliability of the verdict *(Brown v. Louisiana* (1980) 447 U.S. 323, 331-334; *People v. Feagley* (1975) 14 Cal.3d 338, 352), and there is a heightened need for reliability in the procedures leading to the conviction of a capital offense (*Murray v.*

Giarratano (1989) 492 U.S. 1, 8-9; *Beck v. Alabama* (1980) 447 U.S. 625, 638). Therefore, even if not required in all cases, jury unanimity is required in capital cases.

It was error for the trial court to fail to instruct the jury that it had to agree unanimously on the type of first degree murder. The failure to instruct went to the heart of the verdict against appellant. Because the jurors were not required to reach unanimous agreement on the elements of first degree murder, no valid jury verdict was entered and harmless error analysis cannot be applied. This was a structural error and therefore reversal of the entire judgment is required. (*Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 280.)

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VII

THE TRIAL COURT ERRONEOUSLY INSTRUCTED ON CONSCIOUSNESS OF GUILT

Appellant objected to instructing the jury that appellant's statements showed a consciousness of guilt. (38 RT 7406.) The trial court, however, overruled the objection and instructed the jury pursuant to CALJIC No. 2.03:

> If you find that before this trial a defendant made a willfully false and deliberately misleading statement concerning the crimes for which he is now being tried, you may consider such statement as a circumstance tending to prove a consciousness of guilt on the part of such defendant. However, such conduct is not sufficient by itself to prove guilt, and its weight and significance, if any, are matters for your determination.

(40 RT 7844; 3 CT 730.)

This instruction was erroneous. It was unnecessary, improperly argumentative, and permitted the jury to draw irrational inferences against appellant. The instruction allowed the jury to assume that if appellant showed consciousness of guilt of one crime, he was guilty of all of the charged crimes. It improperly permitted the jury to use consciousness of guilt to find that appellant had the particular mental states for the charged offenses. The instruction was particularly prejudicial because appellant's state of mind was one of the key facts that was at issue. Therefore, the error deprived appellant of his rights to due process, a fair trial, a jury trial, equal protection, and reliable jury determinations on guilt, the special

circumstances and penalty.[27] (U.S. Const., 6th, 8th, & 14th Amends.; Cal. Const., art. I, §§ 7, 15, 16, & 17.) Accordingly, reversal of the convictions, the special circumstance finding, and the death judgment is required.

A. The Consciousness Of Guilt Instruction Improperly Duplicated The Circumstantial Evidence Instruction

The instruction given on false statements prior to trial was unnecessary. This Court has held that specific instructions relating to the consideration of evidence that simply reiterate a general principle upon which the jury has already been instructed should not be given. (See *People v. Lewis* (2001) 26 Cal.4th 334, 362-363; *People v. Ochoa* (2001) 26 Cal.4th 398, 444-445.) Here, the trial court instructed the jury on circumstantial evidence. (CALJIC Nos. 2.00, 2.01, 2.02; 40 RT 7842-7844; 3 CT 727-729.) These instructions amply informed the jurors that they could draw inferences from the circumstantial evidence, i.e., that they could infer facts tending to show appellant's guilt from the circumstances of the alleged crimes.

There was no need to repeat this general principle in the guise of permissive inferences of consciousness of guilt, particularly since the instruction served to highlight the prosecution's evidence and theory of the case. This one-sided benefit to the prosecution violated due process and should not be permitted here. (See *Wardius v. Oregon* (1973) 412 U.S. 470, 479 [due process does not allow trial court to favor prosecution].)

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27. Appellant acknowledges that this Court has rejected similar claims. (See, e.g., *People v. Nakahara* (2003) 30 Cal.4th 705, 713.) Appellant asks that these opinions be reconsidered, particularly in light of the facts in this case.

B. The Consciousness Of Guilt Instruction Was Unfairly Partisan And Argumentative

CALJIC No. 2.03 is not just unnecessary, it is also impermissibly argumentative. The trial court must refuse to deliver argumentative instructions because they present the jury with a partisan argument disguised as a neutral, authoritative statement of the law. (See *People v. Sanders* (1995) 11 Cal.4th 475, 560; *People v. Wright* (1988) 45 Cal.3d 1126, 1135-1137.) Such instructions unfairly highlight "isolated facts favorable to one party, thereby, in effect, intimating to the jury that special consideration should be given to those facts." (*Estate of Martin* (1915) 170 Cal. 657, 672.)

Argumentative instructions are defined as those that "invite the jury to draw inferences favorable to one of the parties from specified items of evidence." (*People v. Mincey* (1992) 2 Cal.4th 408, 437 [citations omitted].) Even if they are neutrally phrased, instructions which "ask the jury to consider the impact of specific evidence" (*People v. Daniels* (1991) 52 Cal.3d 815, 870-871), or "imply a conclusion to be drawn from the evidence" (*People v. Nieto Benitez* (1992) 4 Cal.4th 91, 105, fn. 9), are argumentative and must be refused. (*Ibid.*)

Judged by this standard, the consciousness of guilt instructions given in this case are impermissibly argumentative. Structurally, they are almost identical to the defense "pinpoint" instruction which this Court found to be argumentative in *People v. Mincey, supra*, 2 Cal.4th at p. 437. The instruction in *Mincey* told the jurors that if they found certain preliminary facts, they could rely on those facts to find additional facts favorable to one party or the other. Since this instruction was held to be argumentative, the instruction at issue here should be held to be the same.

In *People v. Nakahara* (2003) 30 Cal.4th 705, 713, this Court rejected a challenge to consciousness of guilt instructions holding that *Mincey* was "inapposite for it involved no consciousness of guilt instruction" but rather a proposed defense instruction which "would have invited the jury to 'infer the existence of [the defendant's] version of the facts, rather than his theory of defense." This holding, however, does not explain why two instructions that are identical in structure should be analyzed differently or why instructions that highlight the prosecution's version of the facts are permissible while those that highlight the defendant's version are not.

"There should be absolute impartiality as between the People and defendant in the matter of instructions. . . ." (*People v. Moore* (1954) 43 Cal.2d 517, 526-527, quoting *People v. Hatchett* (1944) 63 Cal.App.2d 144, 158; accord *Reagan v. United States* (1895)157 U.S. 301, 310.) An instructional analysis that distinguishes between parties to the defendant's detriment deprives the defendant of his due process right to a fair trial (*Green v. Bock Laundry Machine Co.* (1989) 490 U.S. 504, 510; *Wardius v. Oregon, supra,* 412 U.S. at p. 474), and the arbitrary distinction between litigants also deprives the defendant of equal protection of the law. (*Lindsay v. Normet (1972)* 405 U.S. 56, 77.)

To insure fairness and equal treatment, this Court should reconsider those cases that have found California's consciousness of guilt instructions not to be argumentative. Except for the party benefitted by the instructions, there is no discernable difference between the instructions this Court has upheld (see, e.g., *People v. Nakahara, supra,* 30 Cal.4th at p. 713; *People v. Bacigalupo* (1991) 1 Cal.4th 103, 123 [CALJIC No. 2.03 "properly advised the jury of inferences that could rationally be drawn from the evidence"])

and a defense instruction held to be argumentative because it "improperly implies certain conclusions from specified evidence." (*People v. Wright, supra,* 45 Cal.3d at p. 1137.)

The alternate rationale this Court employed in *People v. Kelly* (1992) 1 Cal.4th, 495, 531-532, and a number of subsequent cases (e.g., *People v. Arias* (1996) 13 Cal.4th 92, 142), is equally flawed. In *Kelly*, the Court focused on the allegedly protective nature of the instructions, noting that they tell the jury that the consciousness-of-guilt evidence is not sufficient by itself to prove guilt. From this, *Kelly* concluded: "If the court tells the jury that certain evidence is not alone sufficient to convict, it must necessarily inform the jury, either expressly or impliedly, that it may at least consider the evidence." (*People v. Kelly*, *supra*, at p. 532.)

More recently, this Court abandoned the *Kelly* rationale, holding that the error in not giving a consciousness-of-guilt instruction was harmless because the instruction "would have benefitted the prosecution, not the defense." (*People v. Seaton* (2001) 26 Cal.4th, 598, 673.) Moreover, the allegedly protective aspect of the instructions is weak at best and often entirely illusory. The instructions do not specify what else is required before the jury can find that guilt has been established beyond a reasonable doubt. They thus permit the jury to seize upon one isolated piece of evidence, perhaps nothing more than evidence establishing the only undisputed element of the crime, and use that *in combination* with the consciousness-of-guilt evidence to conclude that the defendant is guilty.

Finding that a consciousness of guilt instruction unduly emphasizes a single piece of circumstantial evidence, the Supreme Court of Wyoming held that giving such an instruction always will be reversible error. (*Haddan v. State* (Wyo. 2002) 42 P.3d 495, 508.) In so doing, it joined a

number of other state courts that have found similar flaws in such instructions. Courts in at least eight other states have held that instructions on consciousness of guilt after a defendant flees should not be given because they unfairly highlight isolated evidence. (*Dill v. State* (Ind. 2001) 741 N.E.2d, 1230, 1232-1233; *State v. Hatten* (Mont. 1999) 991 P.2d 939, 949-950; *Fenelon v. State* (Fla. 1992) 594 So.2d 292, 293-295; *Renner v. State* (Ga. 1990) 397 S.E.2d 683, 686; *State v. Grant* (S.C. 1980) 272 S.E.2d 169, 171; *State v. Wrenn* (Idaho 1978) 584 P.2d 1231, 1233-1234; *State v. Cathey* (Kan. 1987) 741 P.2d 738, 748-749; *State v. Reed* (Wash.App.1979) 604 P.2d 1330, 1333.)[28/]

The reasoning of two of these cases is particularly instructive. In *Dill v. State*, *supra*, 741 N.E. 2d 1230, the Indiana Supreme Court relied on that state's established ban on argumentative instructions to disapprove flight instructions:

> Flight and related conduct may be considered by a jury in determining a defendant's guilt. [Citation.] However, although evidence of flight may, under appropriate circumstances, be relevant, admissible, and a proper subject for counsel's closing argument, it does not follow that a trial court should give a discrete instruction highlighting such evidence. To the contrary, instructions that unnecessarily emphasize one particular evidentiary fact, witness, or phase of the case have long been disapproved. [Citations.] We find no reasonable grounds in this case to justify focusing the jury's attention on the evidence of flight.

(*Id.* at p. 1232, fn. omitted.)

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28. Other state courts also have held that flight instructions should not be given, but their reasoning was either unclear or not clearly relevant to the instant discussion. (See, e.g., *State v. Stilling* (Or. 1979) 590 P.2d 1223, 1230.)

In *State v. Cathey*, *supra*, 741 P.2d 738, the Kansas Supreme Court cited a prior case which had disapproved a flight instruction (Id. at p. 748) and extended its reasoning to cover all similar consciousness-of-guilt instructions:

> It is clearly erroneous for a judge to instruct the jury on a defendant's consciousness of guilt by flight, concealment, fabrication of evidence, or the giving of false information. Such an instruction singles out and particularly emphasizes the weight to be given to that evidence by the jury.

(*Id.* at p. 749; accord, *State v. Nelson* (Mont. 2002) 48 P.3d 739, 745 [holding that the reasons for the disapproval of flight instructions also applied to an instruction on the defendant's false statements].) This Court should adopt the reasoning in these cases and hold that the consciousness of guilt instruction given here was impermissibly argumentative.

By singling out evidence favorable to the prosecution, the consciousness of guilt instruction given in this case invaded the province of the jury, focusing the jury's attention on evidence favorable to the prosecution and placing the trial court's imprimatur on the prosecution's theory of the case. It therefore violated appellant's due process right to a fair trial and his right to equal protection of the laws (U.S. Const., 6th & 14th Amends.; Cal. Const. art. I, §§ 7 & 15), his right to receive an acquittal unless his guilt was found beyond a reasonable doubt by an impartial and properly-instructed jury (U.S. Const., 6th & 14th Amends.; Cal. Const. art. I, § 16), and his right to a fair and reliable capital trial. (U.S. Const., 6th & 14th Amends.; Cal. Const. art. I, § 17.)

C. The Consciousness-Of-Guilt Instructions Permitted The Jury To Draw Two Irrational Permissive Inferences About Appellant's Guilt

The consciousness-of-guilt instruction given here suffers from an additional constitutional defect. It embodies improper permissive inferences that improperly intrude upon a jury's exclusive role as fact finder. (See *United States v. Warren* (9th Cir. 1994) 25 F.3d 890, 899.) By focusing on a few isolated facts, such an instruction also may cause jurors to overlook exculpatory evidence and lead them to convict without considering all relevant evidence. (*United States v. Rubio-Villareal* (9th Cir. 1992) 967 F.2d 294, 299-300 (*en banc*).) A passing reference to consider all evidence will not cure this defect. (*United States v. Warren*, *supra*, 25 F.3d at p. 899.) These and other considerations have prompted the Ninth Circuit to "question the effectiveness of permissive inference instructions." (*Ibid.*; see also *id.* at p. 900 (conc. opn. Rymer, J.) ["I must say that inference instructions in general are a bad idea. There is normally no need for the court to pick out one of several inferences that may be drawn from circumstantial evidence in order for that possible inference to be considered by the jury."].)

For a permissive inference to be constitutional, there must be a rational connection between the facts found by the jury from the evidence and the facts inferred by the jury pursuant to the instruction. (*Ulster County Court v. Allen* (1979) 442 U.S. 140, 157; *United States v. Gainey* (1965) 380 U.S. 63, 66-67; *United States v. Rubio-Villareal*, *supra*, 967 F.2d at p. 926.) The Due Process Clause of the Fourteenth Amendment "demands that even inferences – not just presumptions – be based on a rational connection between the fact proved and the fact to be inferred." (*People v. Castro* (1985) 38 Cal.3d 301, 313.) In this context, a rational connection is

not merely a logical or reasonable one; rather, it is a connection that is "more likely than not." (*Ulster County Court v. Allen*, *supra*, 442 U.S. at pp. 165-167, and fn. 28; see also *Schwendeman v. Wallenstein* (9th Cir. 1992) 971 F.2d 313 [noting that the Supreme Court has required "'substantial assurance' that the inferred fact is 'more likely than not to flow from the proved fact on which it is made to depend'"].) This test is applied to judge the inference as it operates under the facts of each specific case. (*Ulster County Court v. Allen*, *supra*, at pp. 157, 162-163.)

In this case, the instruction permitted the jury to infer one fact – appellant's consciousness of guilt – from other facts, his false statements. (See *People v. Ashmus, supra*, 54 Cal.3d at p. 977.) The instruction was not limited to the question of whether appellant was conscious of wrongdoing, but also allowed the jury to consider his statements as evidence of his guilt – which included not only appellant's specific acts but his state of mind before and during the events. Under the facts here, two types of irrational inferences were permitted by the instruction.

The first irrational inference concerned appellant's mental state at the time the charged crimes allegedly were committed. The improper instruction permitted the jury to use the consciousness-of-guilt evidence to infer that appellant had committed the homicide while harboring the intents or mental states required for conviction of first degree murder. Although the consciousness of guilt evidence in a murder case may bear on a defendant's state of mind after the killing, it is *not* probative of his state of mind prior to or during the killing. (*People v. Anderson, supra*, 70 Cal.2d at pp. 32-33.) As this Court explained,

> evidence of defendant's cleaning up and false stories . . . is highly probative of whether defendant committed the crime,

> but it does not bear upon the state of the defendant's mind at the time of the commission of the crime.

(*Id.* at p. 33.) Appellant's actions after the crimes, upon which the consciousness of guilt inferences were based, simply were not probative of whether he harbored the mental states for first degree premeditated murder or the related robbery and burglary charges.

Moreover, the instruction allowed the jury to make broad inferences about the offenses at issue. Even if appellant was guilty of some crime, his statements do not necessarily show consciousness of guilt of all the crimes charged: assuming *arguendo* that appellant committed a homicide, his consciousness of guilt would not necessarily show that he had committed burglary or robbery. Therefore, the instruction permitted the jury to use the inferences in the broadest possible manner, without any rational nexus between appellant's statements and the crime charged.

In *People v. Crandell* (1988) 46 Cal.3d 833, this Court noted that the consciousness-of-guilt instructions do not specifically mention mental state and concluded that:

> A reasonable juror would understand "consciousness of guilt" to mean "consciousness of some wrongdoing" rather than "consciousness of having committed the specific offense charged."

(*Id.* at p. 871.)

The *Crandell* analysis is mistaken for three reasons. First, the instruction does not speak of "consciousness of some wrongdoing;" it speaks of "consciousness of guilt." *Crandell* does not explain why the jury would interpret the instruction to mean something it does not say. Elsewhere in the instructions the term "guilt" is used to mean "guilt of the crimes charged." (See, e.g., 3 CT 746 [CALJIC No. 2.90 stating that the

defendant is entitled to a verdict of not guilty "in case of a reasonable doubt whether his [or] her guilt is satisfactorily shown"].) It would be a violation of due process if the jury could reasonably interpret that instruction to mean that appellant was entitled to a verdict of not guilty only if the jury had a reasonable doubt as to whether his "commission of some wrongdoing" had been satisfactorily shown. (*In re Winship*, *supra*, 397 U.S. at p. 364; see *Jackson v. Virginia*, *supra*, 443 U.S. at pp. 323-324.)

Second, although the consciousness of guilt instruction does not specifically mention the defendant's mental state, it also does not specifically exclude it from the purview of permitted inferences or otherwise hint that any limits on the jury's use of the evidence may apply. On the contrary, the instruction suggests that the scope of the permitted inferences is very broad, expressly advising the jury that the "weight and significance" of the consciousness-of-guilt evidence "if any, are matters for your" determination.[29/]

Third, this Court itself has drawn the very inference that *Crandell* asserts no reasonable juror would make. In *People v. Hayes* (1990) 52 Cal.3d 577, this Court reviewed the evidence of defendant's mental state at the time of the killing, expressly relying on consciousness of guilt evidence among other facts, to find an intent to rob:

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29. In a different context, this Court repeatedly has held that an instruction which refers only to "guilt" will be understood by the jury as applying to intent or mental state as well. It has ruled that a trial court need not deliver CALJIC No. 2.02, which deals specifically with the use of circumstantial evidence to prove intent or mental state, if the court has also delivered CALJIC No. 2.01, the allegedly "more inclusive" instruction, which deals with the use of circumstantial evidence to prove guilt and does not mention intent, mental state, or any similar term. (*People v. Marshall* (1996) 13 Cal.4th 799, 849; *People v. Bloyd* (1987) 43 Cal.3d 333, 352.)

> There was also substantial evidence, apart from James' testimony, that defendant killed Patel *with the intent to rob him* and then proceeded to ransack the motel's office and the manager's living quarters. *Defendant demonstrated consciousness of guilt by fleeing the area and giving a false statement when arrested. . . .*

(*Id.* at p. 608, italics added.) Since this Court considered consciousness of guilt evidence to find substantial evidence that a defendant killed with intent to rob, it should acknowledge that lay jurors have done the same in this case.

Because the consciousness of guilt instruction permitted the jury to draw irrational inferences of guilt against appellant, use of the instruction undermined the reasonable doubt requirement and denied him a fair trial and due process of law (U.S. Const., 14th Amend.; Cal. Const., art. I, §§ 7 & 15). The instruction also violated appellant's right to have a properly instructed jury find that all the elements of all the charged crimes had been proven beyond a reasonable doubt (U.S. Const., 6th & 14th Amends.; Cal. Const., art. I, § 16), and, by reducing the reliability of the jury's determination and creating the risk that the jury would make erroneous factual determinations, the instruction violated his right to a fair and reliable capital trial (U.S. Const., 8th & 14th Amends.; Cal. Const., art. I, § 17). This Court should therefore reconsider its opinions to the contrary and hold that CAJIC No. 2.03 is improper and was erroneously given in this case.

D. The Giving Of The Pinpoint Instruction On Consciousness Of Guilt Was Not Harmless Beyond A Reasonable Doubt

Giving the consciousness of guilt instruction was an error of federal constitutional magnitude as well as a violation of state law. Accordingly, appellant's murder, robbery, and burglary convictions as well as the special circumstance finding must be reversed unless the prosecution can show that

the error was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24; see *Schwendeman v. Wallenstein, supra*, 971 F.3d at p. 316 ["constitutionally deficient jury instruction requires reversal unless the error is harmless beyond a reasonable doubt"].)

As discussed above, the instruction allowed the jury to infer that if appellant showed consciousness of guilt because some crime was committed, then he was guilty of all the charged crimes. It allowed the jury to equate even comparatively innocent statements with guilt. This added significant weight to the evidence against appellant, particularly with regard to the intent necessary to support first degree murder, burglary, and robbery. Under these circumstances, this Court cannot find that the erroneous instructions were harmless beyond a reasonable doubt, requiring that the guilt verdicts and special circumstances findings be reversed. (*Chapman v. California, supra*, 386 U.S. at p. 24.)

Even assuming that the error was harmless in the guilt phase, this Court should find that it was prejudicial in the penalty phase. (See *Monge v. California* (1998) 524 U.S. 721, 732 [penalty phase is a continuation of the guilt phase].) Having been instructed to use inferences against appellant to find him guilty of first degree murder, burglary and robbery, the same inferences certainly would have affected the jurors' consideration of this evidence in the penalty phase, adding to the weight of the circumstances of the crime. (See 50 RT 9821 [prosecutor uses appellant's "lies" to infer appellant was aware that his entire conduct was criminal].) It also allowed the jury to conclude that if appellant was conscious of his guilt in all of the charged crimes, the mitigating evidence of appellant's mental impairments should count for little. Accordingly, the death sentence was obtained in violation of due process, and appellant's rights to a fair and reliable

determination of penalty, free from cruel and unusual punishment. (U.S. Const., 5th, 6th, 8th, & 14th Amends.; Cal. Const., art. I, §§ 7, 15-17.) Reversal of appellant's death sentence is required. (*Chapman v. California*, *supra*, 386 U.S. at p. 24; *People v. Robertson* (1982) 33 Cal.3d 21, 54 [substantial error affecting penalty phase requires reversal].)

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VIII

A SERIES OF GUILT PHASE INSTRUCTIONS UNDERMINED THE REQUIREMENT OF PROOF BEYOND A REASONABLE DOUBT IN VIOLATION OF APPELLANT'S RIGHTS TO DUE PROCESS, A TRIAL BY JURY, AND RELIABLE VERDICTS

Due process "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." (*In re Winship* (1970) 397 U.S. 358, 364; accord, *Cage v. Louisiana* (1990) 498 U.S. 39, 39-40; *People v. Roder* (1983) 33 Cal.3d 491, 497.) The reasonable doubt standard is the "bedrock 'axiomatic and elementary' principle" (*In re Winship*, *supra* at p. 363) at the heart of the right to trial by jury (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 278). Jury instructions violate these constitutional requirements if "there is a reasonable likelihood that the jury understood [them] to allow conviction based on proof insufficient to meet the *Winship* standard" of proof beyond a reasonable doubt. (*Victor v. Nebraska* (1994) 511 U.S. 1, 6.)

The trial court instructed the jury with CALJIC Nos. 2.01[circumstantial evidence], 2.21.1 [discrepancies in witness testimony], 2.21.2 [false testimony by witness], 2.22 [force of evidence], 2.27 [testimony by one witness], 2.51 [motive] and 8.83 [circumstantial evidence for special circumstances]. (3 CT 728, 734-738, 765.) These pattern instructions violated the above principles and thereby deprived appellant of his constitutional rights to due process (U.S. Const., 14th Amend.; Cal. Const., art. I, §§ 7 & 15) and trial by jury (U.S. Const., 6th & 14th Amends.; Cal. Const., art. I, § 16). (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 278; *Carella v. California* (1989) 491 U.S. 263, 265.) They also violated the fundamental requirement for reliability in a capital case by

allowing appellant to be convicted without the prosecution having to present the full measure of proof. (U.S. Const., 8th & 14th Amends.; Cal. Const., art. I, § 17; *Beck v. Alabama* (1980) 447 U.S. 625, 637-638.) Because the instructions violated the federal Constitution in a manner that can never be "harmless," the judgment in this case must be reversed. (*Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 275.)

Appellant recognizes that this Court has previously rejected many of these claims. (See, e.g., *People v. Cleveland* (2004) 32 Cal.4th 704, 750-751; *People v. Jackson* (1996) 13 Cal.4th 1164, 1223-1224; *People v. Crittenden* (1994) 9 Cal.4th 83, 144.) Nevertheless, he raises them here in order for this Court to reconsider those decisions and in order to preserve the claims for federal review if necessary.

A. The Instructions On Circumstantial Evidence Undermined The Requirement Of Proof Beyond A Reasonable Doubt

The jury was instructed that appellant was "presumed to be innocent until the contrary is proved" and that "[t]his presumption places upon the People the burden of proving him guilty beyond a reasonable doubt." (CALJIC No. 2.90; 3 CT 746; 40 RT 7850-7851.) These principles were supplemented by several instructions that explained the meaning of reasonable doubt. CALJIC No. 2.90 defined reasonable doubt as follows:

> [I]t is not a mere possible doubt; because everything relating to human affairs is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the mind of the jurors in that condition that they cannot say they feel an abiding conviction of the truth of the charge.

(40 RT 7851.)

The jury was also given two interrelated instructions – CALJIC Nos. 2.01 and 8.83– that discussed the relationship between the reasonable doubt requirement and circumstantial evidence. These instructions, addressing different evidentiary issues in almost identical terms, advised appellant's jury that if one interpretation of the evidence "appears to you to be reasonable [and] the other interpretation to be unreasonable, you must accept the reasonable interpretation and reject the unreasonable." (40 RT 7843, 40 RT 7862.) In effect, these instructions informed the jurors that if appellant *reasonably appeared* to be guilty, they could find him guilty – even if they entertained a reasonable doubt as to guilt. The defects in this instruction were particularly damaging here where the prosecution's case rested exclusively on circumstantial evidence. The twice repeated directive of these particular instructions undermined the reasonable doubt requirement in two separate but related ways, violating appellant's constitutional rights to due process (U.S. Const., 5th & 14th Amends.; Cal. Const., art. I, §§ 7 & 15), trial by jury (U.S. Const., 6th & 14th Amends.; Cal. Const., art. I, § 16), and reliable determinations of guilt and the special circumstance allegations (U.S. Const., 8th & 14th Amends.; Cal. Const., art. I, § 17).

First, the instructions compelled the jury to find appellant guilty of the homicide and the related felony charges, as well as to find the two felony-murder special circumstances and alleged enhancements as true, using a standard lower than proof beyond a reasonable doubt. (Cf. *In re Winship* (1970) 397 U.S. 358, 364.) The instructions directed the jury to convict appellant based on the appearance of reasonableness: the jurors were told they "must" accept an incriminatory interpretation of the evidence if it "appear[ed]" to be "reasonable." (40 RT 7843, 40 RT 7862.) However,

an interpretation that appears reasonable is not the same as the "subjective state of near certitude" required for proof beyond a reasonable doubt. (*Jackson v. Virginia* (1979) 443 U.S. 307, 315; see *Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 278 ["It would not satisfy the Sixth Amendment to have a jury determine that the defendant is probably guilty"].) Thus, the instruction improperly required convictions, findings that the special circumstances and alleged enhancements were true, and findings of fact necessary to support those verdicts, on a degree of proof less than the constitutionally-mandated one.

Second, the circumstantial evidence instructions were constitutionally infirm because they required the jury to draw an incriminatory inference when such an inference appeared "reasonable." In this way, the instructions created an impermissible mandatory inference that required the jury to accept any reasonable incriminatory interpretation of the circumstantial evidence unless appellant rebutted it by producing a reasonable exculpatory interpretation. Mandatory presumptions, even ones that are explicitly rebuttable, are unconstitutional if they shift the burden of proof to the defendant on an element of the crime. (*Francis v. Franklin* (1985) 471 U.S. 307, 314-318; *Sandstrom v. Montana* (1979) 442 U.S. 510, 524.)

Here, both instructions plainly told the jurors that if only one interpretation of the evidence appeared reasonable, "you must accept the reasonable interpretation and reject the unreasonable." (40 RT 7843, 40 RT 7862.) In *People v. Roder* (1983) 33 Cal.3d 491, 504, this Court invalidated an instruction that required the jury to presume the existence of a single element of the crime unless the defendant raised a reasonable doubt as to the existence of that element. Accordingly, this Court should invalidate the

instructions given in this case, which required the jury to presume all elements of the crimes supported by a reasonable interpretation of the circumstantial evidence unless the defendant produced a reasonable interpretation of that evidence pointing to his innocence.

These instructions had the effect of shifting, or at least significantly lightening, the burden of proof, because they required the jury to find appellant guilty of first degree felony murder as well as the underlying charged felonies unless he came forward with evidence reasonably explaining the prosecution's incriminatory evidence. The jury may have found appellant's defense unreasonable but still have harbored serious questions about the sufficiency of the prosecution's case. Nevertheless, under the erroneous instructions the jury was required to convict appellant if he "reasonably appeared" guilty of the homicide and related offenses, even if the jurors still entertained a reasonable doubt of his guilt. The instruction thus impermissibly suggested that appellant was required to present, at the very least, a "reasonable" defense to the prosecution case when, in fact, "[t]he accused has no burden of proof or persuasion, even as to his defenses." (*People v. Gonzales* (1990) 51 Cal.3d 1179, 1214-1215, citing *In re Winship*, *supra*, 397 U.S. at p. 364, and *Mullaney v. Wilbur* (1975) 421 U.S. 684.)

For these reasons, there is a reasonable likelihood the jury applied the circumstantial evidence instructions to find appellant guilty of the homicide, the property offenses, and to find the special circumstances and enhancements true based on a lesser standard than the federal Constitution requires.

B. Other CALJIC Instructions Also Vitiated The Reasonable Doubt Standard

The trial court gave five other standard instructions that magnified the harm arising from the erroneous circumstantial evidence instructions, and individually and collectively diminished the constitutionally mandated reasonable doubt standard: CALJIC Nos. 2.21.1 [discrepancies in testimony] (40 RT 7846); 2.21.2 [witness wilfully false] (40 RT 7846-7847); 2.22 [weighing conflicting testimony] (40 RT 7847); 2.27 [sufficiency of testimony of one witness] (40 RT 7847); and 2.51 [motive] (40 RT 7847). Each of those instructions, in one way or another, urged the jury to decide material issues by determining which side had presented relatively stronger evidence. Thus, the instructions implicitly replaced the "reasonable doubt" standard with the "preponderance of evidence" test, and vitiated the constitutional prohibition against the conviction of a capital defendant upon any lesser standard of proof. (*Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 278; *Cage v. Louisiana*, *supra*, 498 U.S. at pp. 39-40; *In re Winship*, *supra*, 397 U.S. at p. 364.)

CALJIC Nos. 2.21.1 and 2.21.2 lessened the prosecution's burden of proof. They authorized the jury to reject the testimony of a witness "willfully false in one material part of his or her testimony" unless, "from all the evidence, [they believed] the probability of truth favors his or her testimony in other particulars." (40 RT 7846-7847.) These instructions lightened the prosecution's burden of proof by allowing the jury to credit prosecution witnesses if their testimony had a "mere probability of truth." (See *People v. Rivers* (1993) 20 Cal.App.4th 1040, 1046 [instruction telling the jury that a prosecution witness's testimony could be accepted based on a "probability" standard is "somewhat suspect"].) The essential mandate of

Winship and its progeny — that each specific fact necessary to prove the prosecution's case must be proven beyond a reasonable doubt — is violated if any fact necessary to any element of an offense can be proven by testimony that merely appeals to the jurors as more "reasonable," or "probably true." (See *Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 278; *In re Winship*, *supra*, 397 U.S. at p. 364.)

CALJIC No. 2.22 provided as follows:

> You are not bound to decide an issue of fact in accordance with the testimony of a number of witnesses which does not convince you as against the testimony of a lesser number or other evidence, which appeals to your mind with more convincing force. You may not disregard the testimony of the greater number of witnesses merely from caprice, whim or prejudice, or from a desire to favor one side against the other. You must not decide an issue by the simple process of counting the number of witnesses who have testified on the opposing sides. The final test is not in the relative number of witnesses, but in the convincing force of the evidence.

(40 RT 7847.) This instruction specifically directed the jury to determine each factual issue in the case by deciding which version of the facts was more credible or more convincing. Thus, the instruction replaced the constitutionally mandated standard of proof beyond a reasonable doubt with one indistinguishable from the lesser preponderance-of-the-evidence standard. The *Winship* requirement of proof beyond a reasonable doubt was violated when the trial court instructed the jurors that any fact necessary to any element of an offense could be proven by testimony of "convincing force." (See *Sullivan v. Louisiana*, *supra*, 508 U.S. at pp. 277-278; *In re Winship*, *supra*, 397 U.S. at p. 364.)

CALJIC No. 2.27, regarding the sufficiency of the testimony of a single witness to prove a fact, likewise was flawed in its erroneous

suggestion that the defense, as well as the prosecution, had the burden of proving facts. (40 RT 7847.) The defendant is only required to raise a reasonable doubt about the prosecution's case; he cannot be required to establish or prove any "fact." However, the instruction informed appellant's jurors that "testimony by one witness which you believe concerning any fact is sufficient for the proof of that fact" and that "[y]ou should carefully review all the evidence upon which the proof of such fact exists" – without qualifying this language to apply only to prosecution witnesses. This instruction permitted reasonable jurors to conclude that: (1) appellant himself had the burden of convincing them that he was not the perpetrator of the homicide and related offenses and (2) this burden was a difficult one to meet. Indeed, this Court has "agree[d] that the instruction's wording could be altered to have a more neutral effect as between the prosecution and defense" and "encourage[d] further effort toward the development of an improved instruction." (*People v. Turner* (1990) 50 Cal.3d 668, 697.) This Court's understated observation does not begin to address the unconstitutional effect of CALJIC No. 2.27, and this Court should find that the instruction violated appellant's Sixth and Fourteenth Amendment rights to due process and a fair jury trial, as well as the Eighth Amendment's requirements for a reliable verdict in a capital case.

Finally, the jury was instructed with CALJIC No. 2.51 as follows:

> Motive is not an element of the crimes charged and need not be shown; however, you may consider motive or lack of motive as a circumstance in this case. Presence of motive may tend to establish the defendant is guilty; absence of motive may tend to show the defendant is not guilty.

(50 RT 7847.) This instruction allowed the jury to determine guilt based on the presence of alleged motive alone and shifted the burden of proof to

appellant to show absence of motive to establish innocence, thereby lessening the prosecution's burden of proof. As a matter of law, however, it is beyond question that motive alone, which is speculative, is insufficient to prove guilt. Due process requires substantial evidence of guilt. (*Jackson v. Virginia*, *supra*, 443 U.S. at p. 320 [a "mere modicum" of evidence is not sufficient]; see *United States v. Mitchell* (9th Cir. 1999) 172 F.3d 1104 , 1108-1109 [motive based on poverty is insufficient to prove theft or robbery].)

"It is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned." (*In re Winship*, *supra*, 397 U.S. at p. 364.) Each of the disputed instructions here individually served to contradict and impermissibly dilute the constitutionally mandated standard under which the prosecution must prove each necessary fact of each element of each offense beyond a reasonable doubt. In the face of so many instructions permitting conviction upon a lesser showing, no reasonable juror could have been expected to understand that he or she could not find appellant guilty unless every element of the offense was proven by the prosecution beyond a reasonable doubt. The instructions challenged here violated appellant's constitutional rights to due process (U.S. Const., 14th Amend.; Cal. Const., art. I, §§ 7 & 15), trial by jury (U.S. Const., 6th & 14th Amends.; Cal. Const., art. I, § 16), and a reliable capital trial (U.S. Const., 8th & 14th Amends.; Cal. Const., art. I, § 17).

C. This Court Should Reconsider Its Prior Rulings Upholding The Defective Instructions

Although each of the challenged instructions violated appellant's federal constitutional rights by lessening the prosecution's burden, this Court has repeatedly rejected constitutional challenges to many of the instructions discussed herein. (See e.g., *People v. Cleveland* (2004) 32 Cal.4th 704, 750-751 [CALJIC Nos. 2.22, 2.51]; *People v. Riel* (2000) 22 Cal.4th 1153, 1200 [false-testimony and circumstantial-evidence instructions]; *People v. Crittenden* (1994) 9 Cal.4th 83, 144 [circumstantial-evidence instructions]; *People v. Noguera* (1992) 4 Cal.4th 599, 633-634 [CALJIC Nos. 2.01, 2.02. 2.27]; *People v. Jennings* (1991) 53 Cal.3d 334, 386 [circumstantial-evidence instructions].) While recognizing the shortcomings of some of those instructions, this Court has consistently concluded that the instructions must be viewed "as a whole," and that when so viewed the instructions plainly mean that the jury should reject unreasonable interpretations of the evidence and give the defendant the benefit of any reasonable doubt, and that jurors are not misled when they are also instructed with CALJIC No. 2.90 regarding the presumption of innocence. That analysis is flawed.

First, what this Court characterizes as the "plain meaning" of the instructions is not what the instructions say. (See *People v. Jennings*, *supra*, 53 Cal.3d at p. 386.) The question is whether there is a reasonable likelihood the jury applied the challenged instructions in a way that violates the Constitution. (*Estelle v. McGuire*, *supra*, 502 U.S. at p. 72.) Here, there is certainly a reasonable likelihood that the jury applied the challenged instructions according to their express terms.

Second, this Court's essential rationale — that the flawed instructions are "saved" by the language of CALJIC No. 2.90 — requires reconsideration. (See *People v. Crittenden*, *supra*, 9 Cal.4th at p. 144.) An instruction that dilutes the beyond-a-reasonable-doubt standard of proof on a specific point is not cured by a correct general instruction on proof beyond a reasonable doubt. (*United States v. Hall* (5th Cir. 1976) 525 F.2d 1254, 1256; see generally *Francis v. Franklin*, (1985) 471 U.S. 307, 322 ["Language that merely contradicts and does not explain a constitutionally infirm instruction will not suffice to absolve the infirmity"]; *People v. Kainzrants* (1996) 45 Cal.App.4th 1068, 1075, citing *People v. Westlake* (1899) 124 Cal. 452, 457 [if an instruction states an incorrect rule of law, the error cannot be cured by giving a correct instruction elsewhere in the charge]; *People v. Stewart* (1983) 145 Cal.App.3d 967, 975 [specific jury instructions prevail over general ones].) "It is particularly difficult to overcome the prejudicial effect of a misstatement when the bad instruction is specific and the supposedly curative instruction is general." (*Buzgheia v. Leasco Sierra Grove* (1997) 60 Cal.App.4th 374, 395.)

Furthermore, nothing in the challenged instructions, as they were given in this case, explicitly told the jurors that those instructions were qualified by the reasonable-doubt instruction. It is just as likely that the jurors concluded that the reasonable-doubt instruction was qualified or explained by the other instructions that contain their own independent references to reasonable doubt.

D. Reversal is Required

Because the erroneous circumstantial evidence instructions permitted conviction on a standard of proof less than proof beyond a reasonable doubt, delivery of the instructions was structural error and is reversible per

se. (*Sullivan v. Louisiana*, *supra*, 508 U.S. at pp. 280-282.) At the very least, because all of the instructions violated appellant's federal constitutional rights, reversal is required unless the prosecution can show that the errors were harmless beyond a reasonable doubt. (*Carella v. California*, *supra*, 491 U.S. at pp. 266-267.)

The prosecution cannot make that showing here, because its proof of appellant's guilt for the murder was based solely on circumstantial evidence that was not entirely conclusive or reliable. Given the dearth of direct evidence on the issue of appellant's mental state and the intent required for first degree murder, robbery, and burglary, the instructions on circumstantial evidence were crucial to the jury's determination of guilt. Because these instructions distorted the jury's consideration and use of circumstantial evidence, and diluted the reasonable doubt requirement, the reliability of the jury's findings is undermined.

Further, CALJIC No. 2.51 permitted the prosecution to prove motive alone in order to establish guilt. The instructional error was particularly prejudicial in this case given that the prosecution's theory of appellant's guilt for the homicide and related charges was based largely on his motive to unlawfully take property belonging to others. The instruction allowed the jury to convict appellant on the motive evidence alone without considering after-acquired intent. This error, alone or considered in conjunction with all the other instructional errors set forth in this brief, requires reversal of appellant's conviction.

The dilution of the reasonable-doubt requirement must be deemed reversible error no matter what standard of prejudice is applied. (See *Sullivan v. Louisiana*, *supra*, 508 U.S. at pp. 278-282; *Cage v. Louisiana*,

supra, 498 U.S. at p. 41; *People v. Roder*, *supra*, 33 Cal.3d at p. 505.)

Accordingly, the judgment of conviction and sentence must be reversed.

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IX

CALIFORNIA'S DEATH PENALTY STATUTE, AS INTERPRETED BY THIS COURT AND APPLIED AT APPELLANT'S TRIAL, VIOLATES THE UNITED STATES CONSTITUTION

Many features of California's capital sentencing scheme violate the United States Constitution. This Court has consistently rejected cogently phrased arguments pointing out these deficiencies. In *People v. Schmeck* (2005) 37 Cal.4th 240, this Court held that what it considered to be "routine" challenges to California's punishment scheme will be deemed "fairly presented" for purposes of federal review "even when the defendant does no more than (I) identify the claim in the context of the facts, (ii) note that we previously have rejected the same or a similar claim in a prior decision, and (iii) ask us to reconsider that decision." (*Id.* at pp. 303-304, citing *Vasquez v. Hillery* (1986) 474 U.S. 254, 257.)

In light of this Court's directive in *Schmeck*, appellant briefly presents the following challenges in order to urge reconsideration and to preserve these claims for federal review. Appellant provides more detail where recent United States Court decisions or the facts in this case call this Court's previous decisions in question, particularly in the way that this Court has considered the burden of proof involved in the penalty decision (section C, *infra*) and in how it has interpreted the limitations requiring an "extreme mental or emotional disturbance" under Penal Code section 190.3, factor (d) (section E, *infra*). Should the court decide to reconsider any of these claims, appellant requests the right to present supplemental briefing.

A. Penal Code Section 190.2 Is Impermissibly Broad

To meet constitutional muster, a death penalty law must provide a meaningful basis for distinguishing the few cases in which the death penalty is imposed from the many cases in which it is not. (*People v. Edelbacher* (1989) 47 Cal.3d 983, 1023, citing *Furman v. Georgia* (1972) 408 U.S. 238, 313 [conc. opn. of White, J.].) Meeting this criteria requires a state to genuinely narrow, by rational and objective standards, the class of murderers eligible for the death penalty. (*Zant v. Stephens* (1983) 462 U.S. 862, 878.) California's capital sentencing scheme does not meaningfully narrow the pool of murderers eligible for the death penalty.

At the time of the offense charged against appellant, Penal Code section 190.2 contained 21 special circumstances. Given the large number of special circumstances, California's statutory scheme fails to identify the few cases in which the death penalty might be appropriate, but instead makes almost all first degree murders eligible for the death penalty. This Court routinely rejects challenges to the statute's lack of any meaningful narrowing. (*People v. Stanley* (1995) 10 Cal.4th 764, 842-843.) This Court should reconsider *Stanley* and strike down Penal Code section 190.2 and the current statutory scheme as so all-inclusive as to guarantee the arbitrary imposition of the death penalty in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

B. The Broad Application of Section 190.3(a) Violated Appellant's Constitutional Rights

Penal Code Section 190.3, factor (a), directs the jury to consider in aggravation the "circumstances of the crime." (See CALJIC No. 8.85; 3 CT 804-805.) Prosecutors throughout California have argued that the jury could weigh in aggravation almost every conceivable circumstance of the

crime, even those that, from case to case, reflect starkly opposite circumstances. Of equal importance is the use of factor (a) to embrace facts that cover the entire spectrum of circumstances inevitably present in every homicide: such as the age of the victim, the age of the defendant, the method of killing, the motive for the killing, the time of the killing, and the location of the killing.

This Court has never applied any limiting construction to factor (a). (*People v. Blair* (2005) 36 Cal.4th 686, 7494 ["circumstances of crime" not required to have spatial or temporal connection to crime].) As a result, the concept of "aggravating factors" has been applied in such a wanton and freakish manner almost all features of every murder can be and have been characterized by prosecutors as "aggravating." As such, California's capital sentencing scheme violates the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution because it permits the jury to assess death upon no basis other than that the particular set of circumstances surrounding the charged murder without some narrowing principle. (See *Maynard v. Cartwright* (1988) 486 U.S. 356, 363; but see *Tuilaepa v. California* (1994) 512 U.S. 967, 987-988 [factor (a) survived facial challenge at time of decision].)

Appellant is aware that the Court has repeatedly rejected the claim that permitting the jury to consider the "circumstances of the crime" within the meaning of section 190.3 in the penalty phase results in the arbitrary and capricious imposition of the death penalty. (*People v. Kennedy* (2005) 36 Cal.4th 595, 641; *People v. Brown* (2004) 34 Cal.4th 382, 401.) Appellant urges the court to reconsider this holding.

C. The Death Penalty Statute and Accompanying Jury Instructions Fail to Set Forth the Appropriate Burden of Proof

1. Appellant's death sentence is unconstitutional because it is not premised on findings made beyond a reasonable doubt

California law does not require that a reasonable doubt standard be used during any part of the penalty phase, except as to proof of prior criminality. (CALJIC Nos. 8.86, 8.87; *People v. Anderson* (2001) 25 Cal.4th 543, 590; *People v. Fairbank* (1997) 16 Cal.4th 1223, 1255; see *People v. Hawthorne* (1992) 4 Cal.4th 43, 79 [penalty phase determinations are moral and not "susceptible to a burden-of-proof quantification"].) In conformity with this standard, appellant's jury was not told that it had to find beyond a reasonable doubt that aggravating factors in this case outweighed the mitigating factors before determining whether or not to impose a death sentence.

A consistent line of cases from the United States Supreme Court require that any fact that is used to support an increased sentence (other than a prior conviction) be submitted to a jury and proved beyond a reasonable doubt. (*Apprendi v. New Jersey* (2000) 530 U.S. 466, 478; *Ring v. Arizona* (2002) 530 U.S. 584, 604; *Blakely v. Washington* (2004) 542 U.S. 296, 303-305, *Cunningham v. California* (2007) ___ U.S. ___ [127 S.Ct. 856].) In order to impose the death penalty in this case, appellant's jury had to first make several factual findings: (1) that aggravating factors were present; (2) that the aggravating factors outweighed the mitigating factors; and (3) that the aggravating factors were so substantial as to make death an appropriate punishment. (CALJIC No. 8.88; 3 CT 831.) Because these additional findings were required before the jury could impose the

death sentence, *Apprendi*, *Ring*, *Blakely*, and *Cunningham* require that each of these findings be made beyond a reasonable doubt. The court failed to so instruct the jury and thus failed to explain the general principles of law "necessary for the jury's understanding of the case." (*People v. Sedeno* (1974) 10 Cal.3d 703, 715; see *Carter v. Kentucky* (1981) 450 U.S. 288, 302.)

Appellant is mindful that this Court has held that the imposition of the death penalty does not constitute an increased sentence within the meaning of *Apprendi* (*People v. Anderson* (2001) 25 Cal.4th 543, 589, fn. 14), and does not require factual findings. (*People v. Griffin* (2004) 33 Cal.4th 536, 595.) In so doing, this Court has repeatedly compared the capital sentencing process in California to "a sentencing court's traditionally discretionary decision to impose one prison sentence rather than another." (*People v. Demetroulias* (2006) 39 Cal.4th 1, 41; *People v. Dickey* (2005) 35 Cal.4th 884, 930; *People v. Snow* (2003) 30 Cal.4th 43, 126, fn. 32; *People v. Prieto* (2003) 30 Cal.4th 226, 275) "Because any finding of aggravating factors during the penalty phase does not 'increase the penalty for a crime beyond the prescribed statutory maximum' (citation omitted), *Ring* imposes no new constitutional requirements on California's penalty phase proceedings." (*People v. Prieto*, *supra*, 30 Cal.4th at p. 263.)

This Court applied similar reasoning to reject the application of *Apprendi* in cases where the trial court imposed the maximum verdict under California's determinate sentencing law (DSL). The Court upheld the DSL because it simply provided for the type of factfinding incident to choosing"an appropriate sentence within a statutorily prescribed sentencing range." (*People v. Black* (2005) 35 Cal.4th 1238, 1254.) However, in

Cunningham, the High Court made clear that this rationale does not comport to Sixth Amendment standards. (*Cunningham*, *supra*, 127 S.Ct. at pp. 868-871.)

In *Cunningham*, the High Court emphasized that any fact that exposes a defendant to a greater potential sentence must be found true by a jury and established beyond a reasonable doubt. (*Id.* at pp. 683-684.) The Court examined whether or not the circumstances in aggravation were factual in nature, and concluded they were, after a review of the relevant rules of court. (*Id.* at pp. 862-863.) Accordingly, the DSL violated the bright-line rule that requires all facts necessary to elevate a sentence to be found by a jury "employing a beyond-a-reasonable-doubt standard." (*Id.* at p. 870.) Since this Court has recognized that the DSL is comparable to the capital sentencing scheme, it is clear that the Sixth Amendment standards adopted in *Apprendi* must be applied here.

Cunningham also rejected the rationale that *Apprendi* does not apply because the maximum penalty for one convicted of first degree murder with a special circumstance is death. In the DSL, the aggravated sentence is obviously the maximum sentence that can be imposed for a crime, but the High Court recognized that the *middle* sentence was the most severe penalty that could be imposed by the sentencing judge without further factual findings: (*Cunningham v. California*, *supra*, at p. 862.) Similarly, to elevate a sentence from life to death, a jury must find that aggravation substantially outweighs mitigation. (*People v. Brown* (1985) 40 Cal.3d 412, 541, fn. 13.) Since this decision involves further factfinding, the Sixth Amendment's requirements for a unanimous jury verdict, beyond a reasonable doubt, must apply. Appellant urges the Court to reconsider its

holding in *Prieto* so that California's death penalty scheme will comport with the principles set forth in *Apprendi*, *Ring*, and *Blakely*, and *Cunningham*.

Apart from the applicability of the Sixth Amendment to California's penalty phase proceedings, appellant also contends that the sentencer of a person facing the death penalty is required by due process and the prohibition against cruel and unusual punishment to be convinced beyond a reasonable doubt not only that the factual bases for its decision are true, but that death is the appropriate sentence. This court has previously rejected appellant's claim that either the Due Process Clause or the Eighth Amendment requires that the jury be instructed that it must decide beyond a reasonable doubt that the aggravating factors outweigh the mitigating factors and that death is the appropriate penalty. (*People v. Blair* (2005) 36 Cal.4th 686, 753.) Appellant requests that the Court reconsider this holding.

2. Some burden of proof is required, or the jury should have been instructed that there was no burden of proof

State law provides that the prosecution always bears the burden of proof in a criminal case. (Evid. Code, § 520.) Evidence Code section 520 creates a legitimate state expectation as to the way a criminal prosecution will be decided and appellant is therefore constitutionally entitled under the Fourteenth Amendment to the burden of proof provided for by that statute. (Cf. *Hicks v. Oklahoma* (1980) 447 U.S. 343, 346 [defendant constitutionally entitled to procedural protections afforded by state law].) Accordingly, appellant's jury should have been instructed that the State had the burden of persuasion regarding the existence of any factor in

aggravation, whether aggravating factors outweighed mitigating factors, and the appropriateness of the death penalty, and that it was presumed that life without parole was an appropriate sentence.

CALJIC Nos. 8.85 and 8.88 fail to provide the jury with the guidance legally required for administration of the death penalty to meet constitutional minimum standards, in violation of the Sixth, Eighth, and Fourteenth Amendments. This Court has held that capital sentencing is not susceptible to burdens of proof or persuasion because the exercise is largely moral and normative, and thus unlike other sentencing. (*People v. Lenart* (2004) 32 Cal.4th 1107, 1136-1137.) This Court has also rejected any instruction on the presumption of life. (*People v. Arias* (1996) 13 Cal.4th 92, 190.) Appellant is entitled to jury instructions that comport with the federal Constitution and thus urges the court to reconsider its decisions in *Lenart* and *Arias*.

Even presuming it were permissible not to have any burden of proof, the trial court erred prejudicially by failing to articulate that to the jury. (Cf. *People v. Williams* (1988) 44 Cal.3d 883, 960 [upholding jury instruction that prosecution had no burden of proof in penalty phase under 1977 death penalty law].) Absent such an instruction, there is the possibility that a juror would vote for the death penalty because of a misallocation of a nonexistent burden of proof.

3. Appellant's death verdict was not premised on unanimous jury findings

a. Aggravating factors

It violates the Sixth, Eighth, and Fourteenth Amendments to impose a death sentence when there is no assurance the jury, or even a majority of

the jury, ever found a single set of aggravating circumstances that warranted the death penalty. (See *Ballew v. Georgia* (1978) 435 U.S. 223, 232-234; *Woodson v. North Carolina* (1976) 428 U.S. 290, 305.) Nonetheless, this Court "has held that unanimity with respect to aggravating factors is not required by statute or as a constitutional procedural safeguard." (*People v. Taylor* (1990) 52 Cal.3d 719, 749.) The Court reaffirmed this holding after the decision in *Ring v. Arizona*. (See *People v. Prieto, supra*, 30 Cal.4th at p. 275.)

As discussed above, appellant submits that *Prieto* was incorrectly decided, and application of the *Ring* reasoning mandates jury unanimity under the overlapping principles of the Sixth, Eighth and Fourteenth Amendments. "Jury unanimity ... is an accepted, vital mechanism to ensure that real and full deliberation occurs in the jury room, and that the jury's ultimate decision will reflect the conscience of the community." (*McKoy v. North Carolina* (1990) 494 U.S. 433, 452 (conc. opn. of Kennedy, J.).)

The failure to require that the jury unanimously find the aggravating factors true also violates the equal protection clause of the federal constitution. In California, when a criminal defendant has been charged with special allegations that may increase the severity of his sentence, the jury must render a separate, unanimous verdict on the truth of such allegations. (See, e.g., Pen. Code, § 1158a.) Since capital defendants are entitled to more rigorous protections than those afforded noncapital defendants (see *Monge v. California* (1998) 524 U.S. 721, 732; *Harmelin v. Michigan* (1991) 501 U.S. 957, 994), and since providing more protection to a noncapital defendant than a capital defendant violates the equal protection clause of the Fourteenth Amendment (see e.g., *Myers v. Y1st* (9th

Cir. 1990) 897 F.2d 417, 421), it follows that unanimity with regard to aggravating circumstances is constitutionally required. To apply the requirement to an enhancement finding that may carry only a maximum punishment of one year in prison, but not to a finding that could have "a substantial impact on the jury's determination whether the defendant should live or die" (*People v. Medina* (1995) 11 Cal.4th 694, 763-764), would by its inequity violate the equal protection clause of the federal Constitution and by its irrationality violate both the due process and cruel and unusual punishment clauses of the federal Constitution, as well as the Sixth Amendment's guarantee of a trial by jury.

Appellant asks the Court to reconsider *Taylor* and *Prieto* and require jury unanimity as mandated by the federal Constitution.

b. Unadjudicated criminal activity

Appellant's jury was not instructed that prior criminality had to be found true by a unanimous jury; nor is such an instruction generally provided for under California's sentencing scheme. In fact, the jury was instructed that unanimity was not required. (CALJIC No. 8.87; 3 CT 807.) Consequently, any use of unadjudicated criminal activity by a member of the jury as an aggravating factor, as outlined in Penal Code section 190.3, factor (b), violates due process and the Fifth, Sixth, Eighth, and Fourteenth Amendments, rendering a death sentence unreliable. (See, e.g., *Johnson v. Mississippi* (1988) 486 U.S. 578 [overturning death penalty based in part on vacated prior conviction].) This Court has routinely rejected this claim. (*People v. Anderson* (2001) 25 Cal.4th 543, 584-585.) Here, the prosecution presented extensive evidence regarding unadjudicated criminal activity allegedly committed by appellant and devoted a considerable

portion of its closing argument to arguing these alleged offenses (See 50 RT 9831-9836 [arguing application of the 1997 Garcia incident and the 1998 incident witnessed by Hooper].)

The United States Supreme Court's recent decisions in *Cunningham v. California*, *supra*, ___ U.S. ___ [127 S.Ct. 856], *Blakely v. Washington*, *supra*, 542 U.S. 296, *Ring v. Arizona*, *supra*, 536 U.S. 584, and *Apprendi v. New Jersey*, *supra*, 530 U.S. 466, confirm that under the due process clause of the Fourteenth Amendment and the jury trial guarantee of the Sixth Amendment, all of the findings prerequisite to a sentence of death must be made beyond a reasonable doubt by a unanimous jury. In light of these decisions, any unadjudicated criminal activity must be found true beyond a reasonable doubt by a unanimous jury.

Appellant is aware that this Court has rejected this very claim. (*People v. Ward* (2005) 36 Cal.4th 186, 221-222.) He asks the Court to reconsider its holdings in *Anderson* and *Ward*.

4. The instructions caused the penalty determination to turn on an impermissibly vague and ambiguous standard

The question of whether to impose the death penalty upon appellant hinged on whether the jurors were "persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole." (CALJIC No. 8.88; 3 CT 832.) The phrase "so substantial" is an impermissibly broad phrase that does not channel or limit the sentencer's discretion in a manner sufficient to minimize the risk of arbitrary and capricious sentencing. Consequently, this instruction violates the Eighth

and Fourteenth Amendments because it creates a standard that is vague and directionless. (See *Maynard v. Cartwright* (1988) 486 U.S. 356, 362.)

This Court has found that the use of this phrase does not render the instruction constitutionally deficient. (*People v. Breaux* (1991) 1 Cal.4th 281, 316, fn. 14.) This Court should reconsider that opinion.

5. The instructions failed to inform the jury that the central determination is whether death is the appropriate punishment

The ultimate question in the penalty phase of a capital case is whether death is the appropriate penalty. (*Woodson v. North Carolina*, *supra*, 428 U.S. at p. 305.) Yet, CALJIC No. 8.88 does not make this clear to jurors; rather it instructs them they can return a death verdict if the aggravating evidence "warrants" death rather than life without parole. (3 CT 832.) These determinations are not the same.

To satisfy the Eighth Amendment "requirement of individualized sentencing in capital cases" (*Blystone v. Pennsylvania* (1990) 494 U.S. 299, 307), the punishment must fit the offense and the offender, i.e., it must be appropriate (see *Zant v. Stephens*, *supra*, 462 U.S. at p. 879). On the other hand, jurors find death to be "warranted" when they find the existence of a special circumstance that authorizes death. (See *People v. Bacigalupo* (1993) 6 Cal.4th 457, 462, 464.) By failing to distinguish between these determinations, the jury instructions violate the Eighth and Fourteenth Amendments to the federal Constitution.

The Court has previously rejected this claim. (*People v. Arias*, *supra*, 13 Cal.4th at p. 171.) Appellant urges this Court to reconsider that ruling.

6. The instructions failed to inform the jurors that if they determined that mitigation outweighed aggravation, they were required to return a sentence of life without the possibility of parole

Penal Code section 190.3 directs a jury to impose a sentence of life imprisonment without parole when the mitigating circumstances outweigh the aggravating circumstances. This mandatory language is consistent with the individualized consideration of a capital defendant's circumstances that is required under the Eighth Amendment. (See *Boyde v. California* (1990) 494 U.S. 370, 377.) Yet, CALJIC No. 8.88 does not address this proposition, but only informs the jury of the circumstances that permit the rendition of a death verdict. By failing to conform to the mandate of Penal Code section 190.3, the instruction violated appellant's right to due process of law. (See *Hicks v. Oklahoma*, *supra*, 447 U.S. at p. 346.)

This Court has held that since the instruction tells the jury that death can be imposed only if it finds that aggravation outweighs mitigation, it is unnecessary to instruct on the converse principle. (*People v. Duncan* (1991) 53 Cal.3d 955, 978.) Appellant submits that this holding conflicts with numerous cases disapproving instructions that emphasize the prosecution theory of the case while ignoring or minimizing the defense theory. (See *People v. Moore* (1954) 43 Cal.2d 517, 526-529; *People v. Kelly* (1980) 113 Cal.App.3d 1005, 1013-1014; see also *People v. Rice* (1976) 59 Cal.App.3d 998, 1004 [instructions required on every aspect of case].) It also conflicts with due process principles in that the nonreciprocity involved in explaining how a death verdict may be warranted, but failing to explain when a verdict of life without parole is

required, tilts the balance of forces in favor of the accuser and against the accused. (See *Wardius v. Oregon* (1973) 412 U.S. 470, 473-474.)

7. The instructions violated the Sixth, Eighth and Fourteenth Amendments by failing to inform the jury regarding the standard of proof and lack of need for unanimity as to mitigating circumstances

The failure of the jury instructions to set forth a burden of proof impermissibly foreclosed the full consideration of mitigating evidence required by the Eighth Amendment. (See *Brewer v. Quarterman* (2007) ___ U.S. ___ [127 S.Ct. 1706, 1712-1724]; *Mills v. Maryland* (1988) 486 U.S. 367, 374; *Lockett v. Ohio* (1978) 438 U.S. 586, 604; *Woodson v. North Carolina*, *supra*, 428 U.S. at p. 304.) Constitutional error occurs when there is a likelihood that a jury has applied an instruction in a way that prevents the consideration of constitutionally relevant evidence. (*Boyde v. California, supra,* 494 U.S. at p. 380.) Such error occurred here because the jury was left with the impression that appellant bore some particular burden in proving facts in mitigation.

A similar error occurred when the trial court failed to instruct the jury that unanimity as to mitigating facts. Appellant's jury was told in the guilt phase that unanimity was required in order to acquit appellant of any charge or special circumstance. In the absence of an explicit instruction to the contrary, there is a substantial likelihood that the jurors believed unanimity was also required for finding the existence of mitigating factors.

A requirement of unanimity improperly limited consideration of mitigating evidence in violation of the Eighth Amendment of the federal Constitution. (See *McKoy v. North Carolina, supra*, 494 U.S. at pp. 442-443.) Had the jury been instructed that unanimity was required before

mitigating circumstances could be considered, there would be no question that reversal would be required. (*Ibid.*; see also *Mills v. Maryland*, *supra*, 486 U.S. at p. 374.) Because there is a reasonable likelihood that the jury erroneously believed that unanimity was required, reversal is also required here. In short, the failure to provide the jury with appropriate guidance was prejudicial and requires reversal of appellant's death sentence since he was deprived of his rights to due process, equal protection and a reliable capital-sentencing determination, in violation of the Sixth, Eighth, and Fourteenth Amendments to the federal Constitution.

8. The instructions improperly failed to inform the penalty jurors on the presumption of life

The presumption of innocence is a core constitutional and adjudicative value that is essential to protect the accused in a criminal case. (See *Estelle v. Williams* (1976) 425 U.S. 501, 503.) In the penalty phase of a capital case, the presumption of life is the correlate of the presumption of innocence. Paradoxically, however, although the stakes are much higher at the penalty phase, there is no statutory requirement that the jury be instructed as to the presumption of life. (See Note, *The Presumption of Life: A Starting Point for Due Process Analysis of Capital Sentencing* (1984) 94 Yale L.J. 351; cf. *Delo v. Lashley* (1983) 507 U.S. 272.)

The trial court's failure to instruct the jury that the law favors life and presumes life imprisonment without parole to be the appropriate sentence violated appellant's right to due process of law (U.S. Const. 14th Amend.), his right to be free from cruel and unusual punishment and to have his sentence determined in a reliable manner (U.S. Const. 8th & 14th Amends.), and his right to the equal protection of the law (U.S. Const. 14th Amend.).

In *People v. Arias, supra,* 13 Cal.4th 92, this Court held that an instruction on the presumption of life is not necessary in California capital cases, in part because the United States Supreme Court has held that "the state may otherwise structure the penalty determination as it sees fit," so long as state law otherwise properly limits death eligibility. (*Id.* at p. 190.) However, as the other sections of this brief demonstrate, this state's death penalty law is remarkably deficient in the protections needed to insure the consistent and reliable imposition of capital punishment. Therefore, a presumption of life instruction was constitutionally required.

D. Failing to Require the Jury to Make Written Findings Violates Appellant's Right to Meaningful Appellate Review

Consistent with state law (*People v. Fauber* (1992) 2 Cal.4th 792, 859), appellant's jury was not required to make any written findings during the penalty phase of the trial. The failure to require written or other specific findings by the jury deprived appellant of his rights under the Sixth, Eighth, and Fourteenth Amendments to the federal Constitution, as well as his right to meaningful appellate review to ensure that the death penalty was not capriciously imposed. (See *Gregg v. Georgia* (1976) 428 U.S. 153, 195.) This Court has rejected these contentions. (*People v. Cook* (2006) 39 Cal.4th 566, 619.) Appellant urges the court to reconsider its decisions on the necessity of written findings.

E. The Instructions to the Jury on Mitigating and Aggravating Factors Violated Appellant's Constitutional Rights

1. The use of restrictive adjectives in the list of potential mitigating factors prevented the jury from giving full effect to appellant's mitigating evidence

The inclusion in the list of potential mitigating factors of such adjectives as "extreme" and "substantial" (see CALJIC No. 8.85; Pen. Code, § 190.3, factors (d) and (g); 3 CT 804-805) acted as barriers to the consideration of mitigation in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments. (*Mills v. Maryland* (1988) 486 U.S. 367, 384; *Lockett v. Ohio* (1978) 438 U.S. 586, 604.) Appellant is aware that the Court has rejected this very argument (*People v. Avila* (2006) 38 Cal.4th 491, 614), but urges reconsideration in this case because appellant's jurors were led to believe that they could not consider evidence of mental impairments mitigating if it did not rise to the level required under factor (d).

The United States Supreme Court recently reaffirmed that "sentencing juries must be able to give meaningful consideration and effect to all mitigating evidence that might provide a basis for refusing to impose the death penalty on a particular individual." (*Abdul-Kabir v. Quarterman* (2007) ___ U.S. ___ [127 S.Ct. 1654, 1664]; .) Indeed, it has long been recognized:

> There is no perfect procedure for deciding in which cases governmental authority should be used to impose death. But a statute that prevents the sentencer in all capital cases from giving independent mitigating weight to aspects of the defendant's character and record and to circumstances of the offense proffered in mitigation creates the risk that the death penalty will be imposed in spite of factors which may call for

> a less severe penalty. When the choice is between life and death, that risk is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments.

(*Lockett v. Ohio* (1978) 438 U.S 586, 605; see also *Penry v. Lynaugh* (1989) 492 U.S. 302, 323 [jury must be able to give a reasoned moral response to defendant's mitigating evidence].)

This Court has assumed that Penal Code section 190.3 and CALJIC No. 8.85 allow meaningful consideration of all mental states because jurors will somehow understand that factor (k) permits consideration of a defendant's less-than-extreme mental or emotional disturbance as mitigating evidence. (See,. e.g., *People v. Wright* (1990) 52 Cal.3d 367, 443-444.) That assumption was disproved in the present case.

Appellant presented substantial evidence that he not only was intoxicated through drugs and alcohol at the time of the crime, but also that he had mental deficits that impaired his judgment and made it difficult for him to change the course of his conduct. (49 RT 9622-9624, 9684-9685.) Yet, the prosecutor argued that this impairment did not meet the standards of an extreme mental or emotional disturbance. (50 RT 9814-9817.) The trial court, in its ruling on the automatic motion for modification, found that there was evidence of impairment, but agreed with the prosecutor that it did not rise to the level of an extreme disorder under factor (d). (53 RT 10404.) Significantly, neither the prosecutor or the trial court acknowledged that appellant's mental impairments could be considered under factor (k). Since

the prosecutor and the trial court did not consider that this evidence could be weighed under factor (k), it is unlikely that the jury did so.[30/]

The erroneous interpretation of factor (d) was understandable because in both law and logic there is a principle that the specific overrides the general. (See, e.g., *Peoplev. Trimble* (1993) 16 Cal.App.4th 1255, 1259.) Related to this is the idea that the inclusion of a specific item will exclude its application in other general contexts: *inclusio unius est exclusio alterius*. (*People v. Castillo* (1997) 16 Ca1.4th 1009, 1020 (conc. opn. of Brown, J.) ["Although the average layperson may not be familiar with the Latin phrase *inclusio unius est exclusio alterius*, the deductive concept is commonly understood . . . ."]; *Alcaraz v. Block* (9th Cir. 1984) 746 F.2d 593, 607 ["maxim *expressio unius* is a product of logic and common sense"].) Thus, appellant's jurors would have certainly have understood that the specific instruction on mental and emotional disturbances under Penal Code section 190.3, factor (d) would control over the general application under factor (k).

To conclude that factor (k) overrides factor (d) would be tantamount to declaring factor (d) extraneous. Just as another fundamental rule of logic and construction requires that "a construction that renders [even] a[single]

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30. Appellant's trial counsel did not argue that appellant's impairments should be considered under factor (k) even if did not rise to the level of an extreme mental or emotional disturbance. Nor did trial counsel object to the trial court's interpretation of the statute and its findings in its ruling on the motion for modification. Thus, it is likely that counsel also understood the limiting language in factor (d) to preclude consideration of mental impairments that are not "extreme." If appellant's advocate believed that the statute precluded consideration of less-than-extreme impairments, the jurors would certainly have believed the same.

word surplusage . . . be avoided" (*Delaney v. Superior Court* (1990) 50 Cal.3d 785, 799), so too one would expect a juror to have rejected an interpretation of the court's instructions that would have rendered all of factor (d) surplusage.

Finally, the language of factor (k) in no way compelled a juror to interpret it as overriding factor (d). To the contrary, the pertinent portion of factor (k) merely directed the jurors to consider "any sympathetic or other aspect of the defendant's character . . . that the defendant offers as a basis for a sentence less than death. . . ." (3 CT 805.) There was no reason a juror would necessarily interpret appellant's mental or emotional impairment at the time of the killings – the subject of factor (d) – as an "aspect of his character." A juror more likely believed that factors (d) and (k) dealt with different subjects – just as the prosecutor argued and the trial court found in its ruling on the automatic motion.

Appellant's mitigating evidence of mental impairment provided important factors for the jurors to consider. Dr. Watson testified that appellant was substantially impaired in his ability to change the course of his action: appellant persisted in doing things because he could not find a way to change his conduct. (49 RT 9623-9624.) Dr. Watson found deficits in appellant's executive function that affected appellant's behavior, judgment, and organization – that is, his ability to make decisions. (49 RT 9684.) Accordingly, appellant's jurors could have found that appellant's impairment made it difficult or impossible for him to stop the course of the crime, even after he first struck the victim. It would explain why he left a haphazard string of items across the two properties and took items of no value to him or anyone else. It also placed his statements to the sheriff's

investigators into context, allowing the jurors to understand that appellant was caught up in a pattern that he was unable to alter, rather than rationally attempting to evade responsibility. The mitigating evidence thus explained much of the aggravation argued by the prosecutor, including the prosecutor's theory that appellant could have stopped the attack after first striking the victim. Yet, because Dr. Watson characterized appellant as suffering from a "mild brain dysfunction" (49 RT 9625), the jury undoubtedly accepted the prosecutor's argument and concluded that the mental impairment was not applicable under factor (d) or any other sentencing guideline.

In many ways, this case is similar to *Brewer v. Quarterman* (2007) ___ U.S.___ [127 S.Ct. 1706], where the prosecutor's argument limited the jury's consideration of mitigating evidence. (*Id.* at p. 1711 [argument "demphasized any mitigating effect that such evidence should have on the jury's determination"].) Our High Court found that the jury was likely to have accepted the prosecutor's reasoning, which required reversal even if the mitigating evidence in *Brewer* was not as strong as in other cases. (*Id.* at p. 1712.) In so doing, the Court rejected the claim that there had to be evidence of a chronic or immutable mental illness before an error that foreclosed consideration of evidence was prejudicial.

> Nowhere in our *Penry* line of cases have we suggested that the question whether mitigating evidence could have been adequately considered by the jury is a matter purely of quantity, degree, or immutability. Rather, we have focused on whether such evidence has mitigating relevance to the special issues and the extent to which it may diminish a defendant's moral culpability for the crime.

(*Id.* at pp. 1712 -1713.) Thus, it found that the Texas courts had "failed to heed the warnings that have repeatedly issued from this Court regarding the extent to which the jury must be allowed not only to consider such evidence, or to have such evidence before it, but to respond to it in a reasoned, moral manner and to weigh such evidence in its calculus of deciding whether a defendant is truly deserving of death." (*Id.* at p. 1714.)

Here, the instructions foreclosed consideration of appellant's mitigation under factor (d) and neither the instructions nor the argument of counsel informed the jury that it could be considered elsewhere. If appellant's impairment was not applicable under factor (d), then the jury was left with a wilful and deliberate crime, with a mental state that was not mitigated or explained. When jurors are unable to give meaningful effect or a reasoned moral response to a defendant's mitigating evidence, "the sentencing process is fatally flawed." (*Abdul-Kabir v. Quarterman*, *supra*, 127 S.Ct. at p. 1675.) Appellant therefore requests that the Court reconsider its previous opinions in light of *Brewer* and *Abdul-Kabir* and reverse the penalty judgment.

2. The failure to delete inapplicable sentencing factors diminished the weight of mitigation

Many of the sentencing factors set forth in CALJIC No. 8.85 were inapplicable to appellant's case, in particular factors (e) [the consent of the victim]; (f) [reasonable moral justification]; (g) [duress]; and (j) [accomplice]. The trial court failed to omit those factors from the jury instructions (3 CT 804-805), likely confusing the jurors and preventing them from making a reliable determination of the appropriate penalty, in violation of defendant's constitutional rights. Even assuming that the juror did not apply inapplicable sentencing factors as aggravation (50 RT 9808

[argument of prosecutor explaining that inapplicable factors should not be considered]), jurors could not help but believe appellant's case in mitigation was weaker because there were a number of factors that did not apply. Appellant asks the Court to reconsider its decision in *People v. Cook* (2006) 36 Cal.4th 566, 618, and hold that the trial court erred in failing to delete all inapplicable sentencing factors from the instructions.

3. The failure to instruct that statutory mitigating factors were relevant solely as potential mitigators

In accordance with customary state court practice, the instructions did not identify which of the sentencing factors in CALJIC No. 8.85 were aggravating, which were mitigating, or which could be either aggravating or mitigating depending upon the jury's appraisal of the evidence. (3 CT 804-805.) The Court has upheld this practice. (*People v. Hillhouse* (2002) 27 Cal.4th 469, 509.) As a matter of state law, however, several of the factors set forth in CALJIC No. 8.85 – factors (d), (e), (f), (g), (h), and (j) – were relevant solely as possible mitigators. (*People v. Hamilton* (1989) 48 Cal.3d 1142, 1184; *People v. Davenport* (1985) 41 Cal.3d 247, 288-289). Appellant's jury, however, was free to conclude that a "not" answer as to any of these "whether or not" sentencing factors could establish an aggravating circumstance. Consequently, the jury was invited to aggravate appellant's sentence based on non-existent or irrational aggravating factors, thus precluding the reliable, individualized, capital sentencing determination required by the Eighth and Fourteenth Amendments. (See *Stringer v. Black* (1992) 503 U.S. 222, 230-236.) As such, appellant asks the court to reconsider its holding that the court need not instruct the jury that certain sentencing factors are only relevant as mitigators.

F. The Prohibition Against Inter-Case Proportionality Review Guarantees Arbitrary and Disproportionate Impositions of the Death Penalty

The California capital sentencing scheme does not require that either the trial court or this Court undertake a comparison between this and other similar cases regarding the relative proportionality of the sentence imposed, i.e., inter-case proportionality review. (See *People v. Fierro* (1991) 1 Cal.4th 173, 253.) The failure to conduct inter-case proportionality review violates the Fifth, Sixth, Eighth, and Fourteenth Amendment prohibitions against proceedings conducted in a constitutionally arbitrary, unreviewable manner or that violate equal protection or due process. For this reason, appellant urges the court to reconsider its failure to require inter-case proportionality review in capital cases.

G. The California Capital Sentencing Scheme Violates the Equal Protection Clause

California's death penalty scheme provides significantly fewer procedural protections for persons facing a death sentence than are afforded persons charged with non-capital crimes in violation of the Equal Protection Clause. To the extent that there may be differences between capital defendants and non-capital felony defendants, those differences justify more, not fewer, procedural protections for capital defendants.

In a non-capital case, any true finding on an enhancement allegation must be unanimous and beyond a reasonable doubt, aggravating and mitigating factors must be established by a preponderance of the evidence, and the sentencer must set forth reasons justifying the defendant's sentence. (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 325; Cal. Rules of Court, rule 4.420, (b) & (e).) In a capital case, there is no burden of proof at all; the jurors need not agree on what aggravating circumstances apply; and

specific findings to justify the defendant's sentence are not required. Appellant acknowledges that this Court has previously rejected these equal protection arguments (*People v. Manriquez* (2005) 37 Cal.4th 547, 590), but asks the Court to reconsider.

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CALIFORNIA'S USE OF THE DEATH PENALTY AS A REGULAR FORM OF PUNISHMENT AND AS APPLIED IN THIS CASE FALLS SHORT OF INTERNATIONAL NORMS

It has long been settled that international law is part of the law of this nation and state. (*The Paquete Habana* (1900) 175 U.S. 677, 700.) It is also something that guides the interpretation of our own constitution and the evolving standards of decency under the Eighth Amendment. This Court, however, has rejected all claims that the death penalty violates international law. (See, e.g., *People v. Cook* (2006) 39 Cal.4th 566, 618-619; *People v. Snow* (2003) 30 Cal.4th 43, 127.) These opinions should be reconsidered in light of the international community's overwhelming rejection of the death penalty as a regular form of punishment. Moreover, even if the death penalty may be imposed, this Court must consider the specific application of international law to the circumstances of this case.

International law is determined by both treaty obligations and customary practices that define the law of nations. (*Siderman de Blake v. Republic of Argentina* (9th Cir. 1992) 965 F.2d 699, 715 [content of international law determined by reference "to the customs and usages of civilized nations, and, as evidence of these, to the works of jurists and commentators"].) Even treaties and international agreements that are not ratified by a particular country may still be binding as demonstrating the customary law of nations. "International agreements create law for the states parties thereto and may lead to the creation of customary international law when such agreements are intended for adherence by states generally and are in fact widely accepted." (Rest.3d Foreign Relations Law of the United States, § 102.)

Moreover, international law provides an important basis for interpreting our own Constitution, particularly the evolving standards of the Eighth Amendment's prohibition against cruel and unusual punishment. (See *Roper v. Simmons* (2005) 543 U.S. 551, 567] [abolition of juvenile death penalty]; *Lawrence v. Texas* (2003) 539 U.S. 558, 572-573 [recognizing importance of international law in determining constitutional issues]; *Atkins v. Virginia* (2002) 536 U.S. 304, 316, fn . 21 [citing practices of the world community in prohibiting death penalty for mentally retarded offenders]; *Trop v. Dulles* (1958) 356 U.S. 86, 102 [referring to unanimity of the "civilized nations"].) Indeed, "'[c]ruel and unusual punishments' and 'due process of law' [are not] static concepts whose meaning and scope were sealed at the time of their writing. They were designed to be dynamic and gain meaning through application to specific circumstances, many of which were not contemplated by their authors." (*Furman v. Georgia* (1972) 408 U.S. 238. 420 (dis. opn. of Powell, J.) Thus, the Eighth Amendment "draw[s] its meaning from the evolving standards of decency that mark the progress of a maturing society." (*Trop v. Dulles*, *supra*, 356 U.S. at p. 100.)

The use of the death penalty in this country is increasingly at odds with the practice of other nations:

> The United States stands as one of a small number of nations that regularly uses the death penalty as a form of punishment. . . [and] with China, Iran, Nigeria, Saudi Arabia, and South Africa [under the former *apartheid* regime] as one of the few nations which has executed a large number of persons. . . . Of 180 nations, only ten, including the United States, account for an overwhelming percentage of state ordered executions.

(*Soering v. United Kingdom: Whether the Continued Use of the Death Penalty in the United States Contradicts International Thinking* (1990) 16 Crim. and Civ. Confinement 339, 366 [31]; see also *Ring v. Arizona* (2002) 536 U.S. 584, 618 (conc. opn. of Breyer, J.) [other nations have abolished capital punishment].

Article 6 of the International Covenant on Civil and Political Rights refers to abolition of the death penalty in terms that strongly suggest that abolition is desirable. (See Second Optional Protocol to the International Covenant on Civil & Political Rights, Aiming at the Abolition of the Death Penalty. Adopted by the General Assembly, December 15, 1989.) Thus, United Nations reports have noted an "encouraging trend" towards abolition of the death penalty in most countries. (Executive Summary, "Capital Punishment and Implementation of the Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty," Report of the Secretary-General to Economic and Social Council, E/2005/3, Session July 29, 2005.)

The Supreme Court of Canada has also emphasized the international context for ending the death penalty:

> Amnesty International reports that in 1948, the year in which the Universal Declaration of Human Rights was adopted, only eight countries were abolitionist. In January 1998, the Secretary-General of the United Nations, in a report submitted to the Commission on Human Rights (U.N. Doc. E/CN.4/1998/82), noted that 90 countries retained the death penalty, while 61 were totally abolitionist, 14 (including Canada at the time) were classified as abolitionist for ordinary

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31. Since this article was published in 1995, South Africa has abandoned the death penalty.

> crimes and 27 were considered to be abolitionist de facto (no executions for the past 10 years) for a total of 102 abolitionist countries. At the present time, it appears that the death penalty is now abolished (apart from exceptional offences such as treason) in 108 countries. These general statistics mask the important point that abolitionist states include all of the major democracies except some of the United States, India and Japan. . . . According to statistics filed by Amnesty International on this appeal, 85 percent of the world's executions in 1999 were accounted for by only five countries: the United States, China, the Congo, Saudi Arabia and Iran.

(*Minister of Justice v. Burns* (2001) 1 S.C.R. 283 [2001 SCC 7], ¶ 91.) In particular, the nations of Western Europe are uniform in not using the death penalty. (See, e.g., *Stanford v. Kentucky* (1989) 492 U.S. 361, 389 (dis. opn. of Brennan, J.); *Thompson v. Oklahoma, supra,* 487 U.S. at p. 830 (plur. opn. of Stevens, J.).) Eighth Amendment jurisprudence must therefore recognize that the international standards of decency have evolved, and re-examine the use of the death penalty in this state. This Court should prohibit the use of a form of punishment that is generally rejected apart from a handful of countries whose "standards of decency" are supposedly antithetical to our own.

Even assuming that the death penalty may be imposed, international law imposes a particularly high standard that must be met in such cases. As discussed above (Argument III [insufficient evidence]), international law allows use of the death penalty only if the evidence leaves "no room for alternative explanation of the facts." ("Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty" (1984) ECOSOC Res. 1984/50.) It also protects the right of a fair trial. (Report of the Human Rights Committee, GAOR, 45th Session, Supplement No. 40, Vol. II (1990), Annex IX, J, para. 12.2, reprinted in 11 Hum. Rts. L.J. 321 (1990)

["in capital punishment cases, the duty of States parties to observe rigorously all the guarantees for a fair trial. . . is even more imperative"].) Appellant was denied his right to a fair hearing throughout his trial, as shown by the cumulative effect of all claims raised in this brief, which are incorporated herein by reference. In particular, crucial evidence against appellant was obtained through improper coercion and in violation of his right to silence. Speculative evidence painted a vivid picture of the crime and inflamed the jury against appellant. The trial court's instructions failed to present any alternative to the prosecutor's theory of the case and skewed the verdict toward first degree murder. The trial court delivered numerous instructions that diminished both the reasonable doubt standard and the jury's consideration of mitigating evidence. These factors rendered appellant's trial unfair. Moreover, under international law standards, this Court should reconsider those claims – such as the limitation on considering mitigating evidence that did not rise to the level of an extreme impairment under Penal Code section 190.3, factor (d) – that it has previously rejected to ensure that the claims raised did not impact appellant's trial. It must reverse the death penalty in this case.

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XI

CUMULATIVE ERROR REQUIRES THAT THE GUILT AND PENALTY VERDICTS BE REVERSED

Even assuming that none of the errors identified by appellant is prejudicial standing alone, the cumulative effect of these errors undermines confidence in the integrity of the guilt and penalty phase proceedings. (*Harris v. Wood* (9th Cir. 1995) 64 F.3d 1432, 1438- 1439; *Mak v. Blodgett* (9th Cir. 1992) 970 F.2d 614, 622; *United States v. Wallace* (9th Cir. 1988) 848 F.2d 1464, 1475-1476; *People v. Hill* (1998) 17 Cal.4th 800, 844-845; *People v. Holt* (1984) 37 Cal.3d 436, 459.)

Even where no single error when examined in isolation is sufficiently prejudicial to warrant reversal, the cumulative effect of multiple errors may be such that reversal is required. (See *Cooper v. Fitzharris* (9th Cir. 1978) 586 F.2d 1325, 1333 (*en banc*) ["prejudice may result from the cumulative impact of multiple deficiencies"]; *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 642-643 [cumulative errors may so infect "the trial with unfairness as to make the resulting conviction a denial of due process"].) Indeed, where there are a number of errors at trial, "a balkanized, issue-by-issue harmless error review" is far less meaningful than analyzing the overall effect of all the errors in the context of the evidence introduced at trial against the defendant. (*United States v. Wallace*, *supra*, 848 F.2d at p. 1476.) Reversal is required unless it can be said that the combined effect of all of the errors, constitutional and otherwise, was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24; *People v. Williams* (1971) 22 Cal.App.3d 34, 58-59 [applying the *Chapman* standard to the totality of the

errors when errors of federal constitutional magnitude combined with other errors].)

In addition, the death judgment itself must be evaluated in light of the cumulative error occurring at both the guilt and penalty phases of appellant's trial. (See *People v. Hayes* (1990) 52 Cal.3d 577, 644 [court considers prejudice of guilt-phase instructional error in assessing that in penalty phase].) In this context, this Court has expressly recognized that evidence that may otherwise not affect the guilt determination can have a prejudicial impact on the penalty trial.

> Conceivably, an error that we would hold nonprejudicial on the guilt trial, if a similar error were committed on the penalty trial, could be prejudicial. Where, as here, the evidence of guilt is overwhelming, even serious error cannot be said to be such as would, in reasonable probability, have altered the balance between conviction and acquittal, but in determining the issue of penalty, the jury, in deciding between life imprisonment and death, may be swayed one way or another by any piece of evidence. If any substantial piece or part of that evidence was inadmissible, or if any misconduct or other error occurred, particularly where, as here, the inadmissible evidence and other errors directly related to the character of appellant, the appellate court by no reasoning process can ascertain whether there is a 'reasonable probability' that a different result would have been reached in absence of error.

(*People v. Hamilton* (1963) 60 Cal.2d 105, 136-137; see also *People v. Brown* (1988) 46 Cal.3d 432, 466 [error occurring at the guilt phase requires reversal of the penalty determination if there is a reasonable possibility that the jury would have rendered a different verdict absent the error]; *In re Marquez* (1992) 1 Cal.4th 584, 605, 609 [an error may be harmless at the guilt phase but prejudicial at the penalty phase].)

Other courts similarly have recognized that "what may be harmless error in a case with less at stake becomes reversible error when the penalty is death." (*Irving v. State* (Miss.1978) 361 So.2d 1360, 1363.) Accordingly, even if the individual errors are harmless on their own, the cumulative effect of these errors upon the penalty verdict must be examined with special caution. (See *Burger v. Kemp* (1987) 483 U.S. 776, 785 ["duty to search for constitutional error with painstaking care is never more exacting than it is in a capital case"].)

Here, appellant's trial was fundamentally flawed through the use of his statements and evidence that was taken in violation due process and Fifth Amendment standards. It was compromised by instructions that did not inform appellant's jury of alternatives to robbery – instructions that tilted the deliberations to favor first degree murder. The jury was inflamed against appellant by speculative evidence that allowed them to imagine the victim lying helpless in the living room, before she was ultimately killed in her bedroom. In the penalty case, the instructions allowed the jury to dismiss appellant's mitigation evidence of mental impairment because it did not rise to the level of an extreme disturbance required under Penal Code section 190.3, factor (d), so that the jury could not have given full consideration to this evidence. The cumulative impact of these errors led to a guilt conviction based upon conjecture and surmise and the penalty of death. This Court must find that the cumulative effect of the errors require reversal of both the guilt and penalty judgments. (*Chapman v. California*, *supra*, 386 U.S. at p. 24.)

CONCLUSION

For all the reasons stated above, the judgment this case must be reversed.

DATED: October 5, 2007

Respectfully submitted,

MICHAEL J. HERSEK
State Public Defender

ARNOLD ERICKSON
Deputy State Public Defender

CERTIFICATE OF COUNSEL

(Cal. Rules of Court, Rule 8.630(b)(2))

I, Arnold A. Erickson, am the Deputy State Public Defender assigned to represent appellant Ronald Wayne Moore in this automatic appeal. I instructed a member of our staff to conduct a word count of this brief using our office's computer software. On the basis of that computer-generated word count, I certify that the brief is 39,778 words in length.

Dated: October 5, 2007

ARNOLD A. ERICKSON
Attorney for Appellant

DECLARATION OF SERVICE

Re: PEOPLE v. RONALD WAYNE MOORE No. S081479

I, GLENICE D. FULLER, declare that I am over 18 years of age, and not a party to the within cause; that my business address is 221 Main Street, 10th Floor, San Francisco, California 94105; that I served a true copy of the attached:

APPELLANT'S OPENING BRIEF

on each of the following, by placing same in an envelope addressed respectively as follows:

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Each said envelope was then, October 5, 2007, sealed and deposited in the United States mail at San Francisco, California, the county in which I am employed, with the postage thereon fully prepaid.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on October 5, 2007, at San Francisco, California.

Glenice D. Fuller
DECLARANT